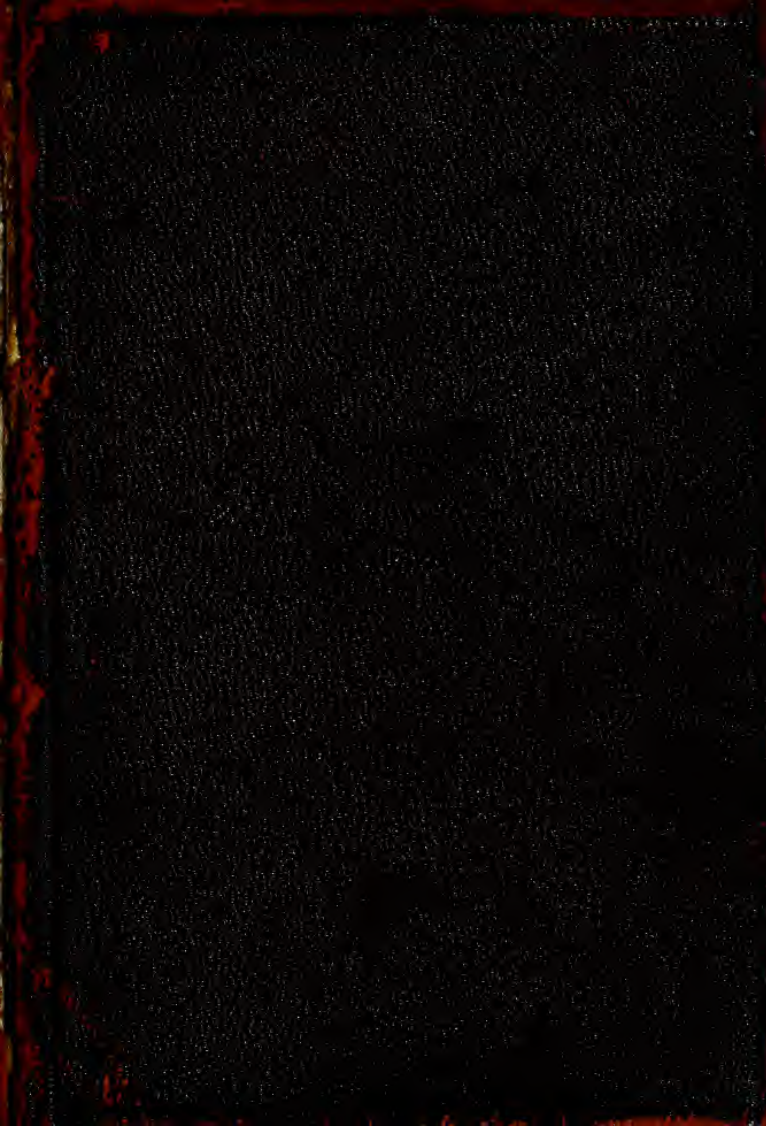
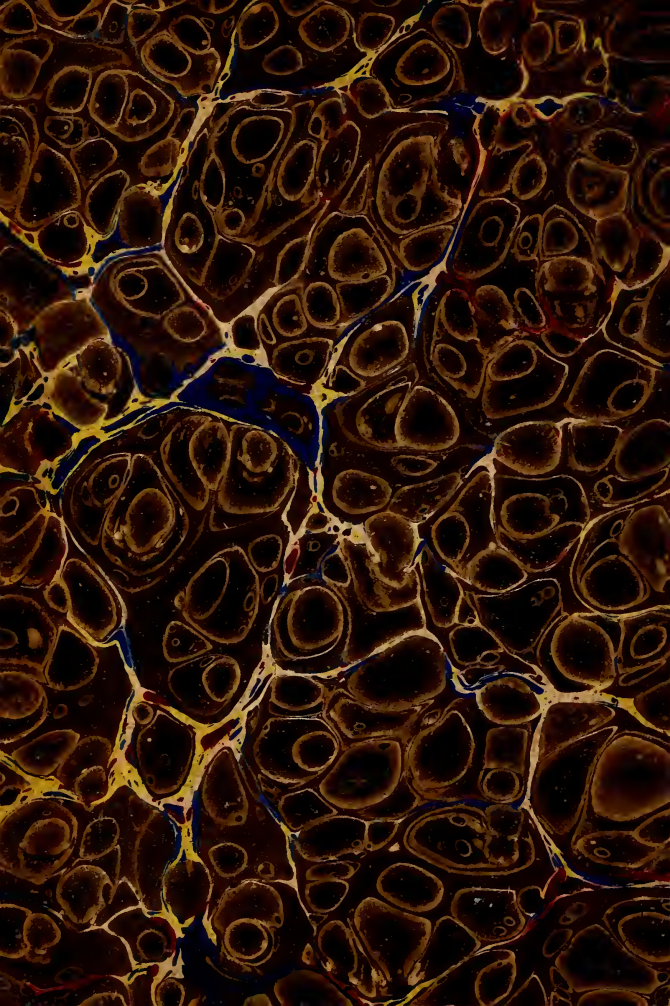
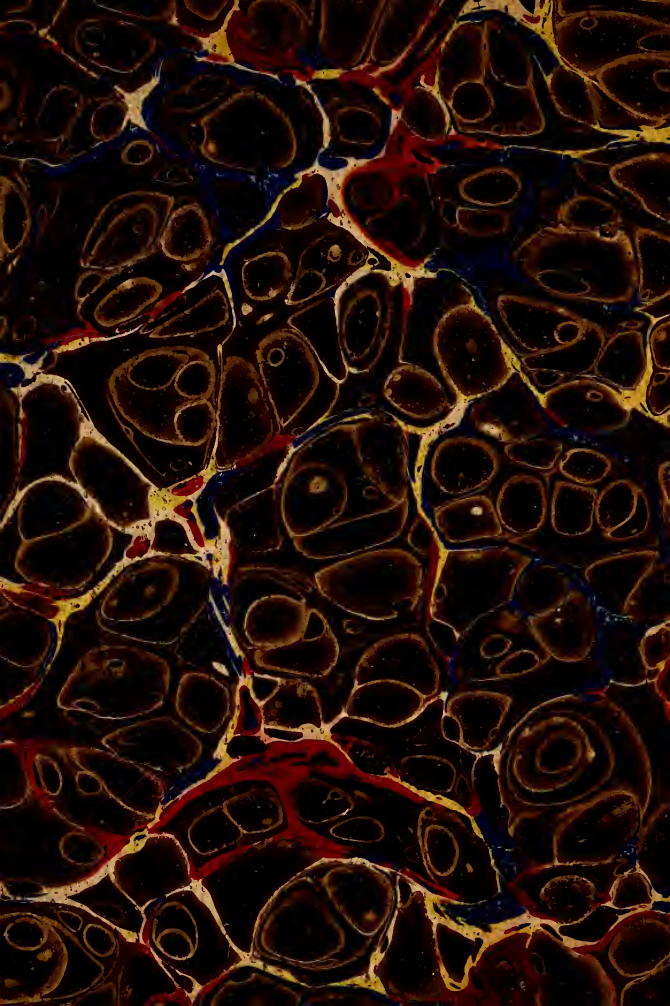




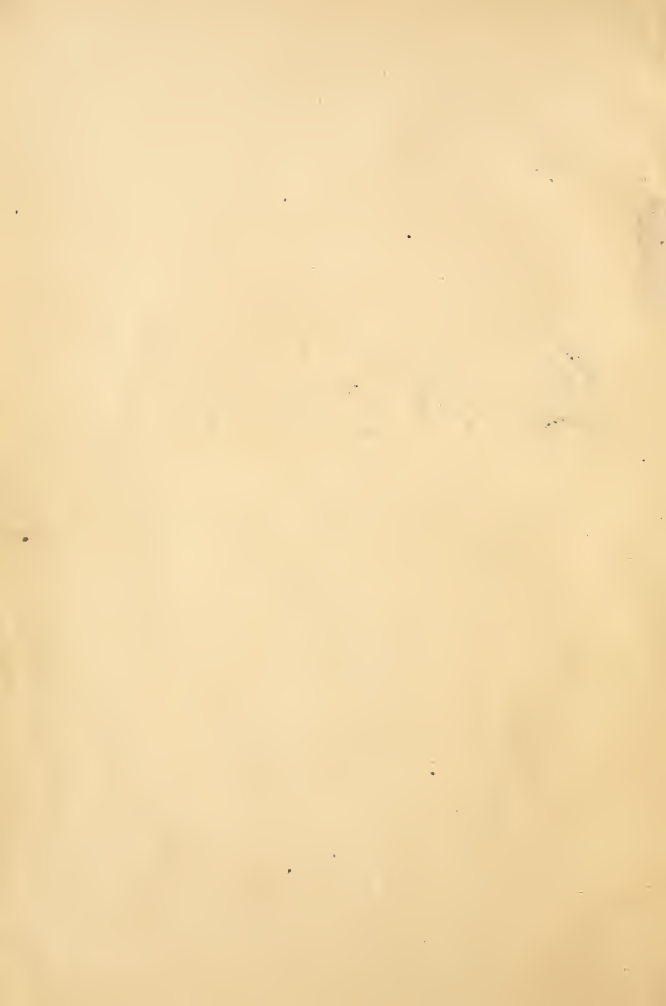






Equity

Chas. W. Dahlinger
July 9th 1885



A MANUAL
OF THE
GENERAL PRINCIPLES OF LAW
AS STATED IN
BLACKSTONE AND THE LEADING WRITERS ON THE LAW
OF PLEADING; TOGETHER WITH A CHAPTER OF
SUGGESTIONS TO STUDENTS, AND A
LAW GLOSSARY.

COLLECTED AND ARRANGED SO AS TO BE MORE EASILY
ACQUIRED BY STUDENTS, AND READILY RE-
VIEWED BY YOUNG PRACTITIONERS.

BY M. E. DUNLAP,
COUNSELLOR AT LAW.

ST. LOUIS:
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1879.

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M. E. DUNLAP,
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PREFACE.

When Mr. Wilberforce asked the advice of Lord Eldon as to the course to be pursued by the young Grants in their legal studies, the advice was, "to live the life of a hermit and work like a horse." That has been, and no doubt still is, sound advice in England to make a great lawyer; and in some measure it is, and perhaps will be more so, in the United States. But we are a different race of people, or, rather, a like race under different circumstances. The labor of the profession is not divided here as it is in England, and probably never will be; the consequence is, that to make a great lawyer one may have much less learned lore, and must have much more knowledge of men and things in general.

There is no spot on the earth where the legal profession calls for such varied and extensive acquirements as it does in this country. A lawyer here, to be eminent, ought to know everything which can be known, for there is no kind of knowledge that he may not be required to bring into use. With these facts in view, this volume has been prepared to aid the student in the thorough mastery of his course of *legal studies*, and, to some extent, obviate the loss of time during his final preparation for admission to the bar; also, to give him some practical hints touching the best methods of acquiring a knowledge of the law and its practice. Many of the Suggestions to Students herein presented are taken, like the Abridgment itself, from some of the leading English and

American writers in the arena of legal science; they were found to be so elegantly and learnedly written that the author felt there was no room left for even slight improvement; besides this, age has given to them, as to precedents in the law, a veneration and potency unattending later efforts in the same direction. The chief design of this work is to give in the fewest pages the principles and definitions of law and equity, to furnish a review or note book and *vade mecum* for LAW STUDENTS and young practitioners. It is said that "the substance of any science consists of certain elementary rules or first principles, which, as they are generally the pure dictates of reason, and short and simple in their phraseology, find an easy access to the mind. These rules are necessarily numerous, and, with their exceptions, constitute the entire learning of any science." Principles, owing to the universality of their expression, their reason and application, glide almost imperceptibly into the mind, and, once seated in the memory, seldom or never abandon it. That which is forcibly impressed on the understanding, because fully comprehended, is not liable to forsake us; hence those rules which have been repeatedly tested by reason, and successfully applied to an infinite variety of cases, and finally adopted as principles, have a particular congeniality with the mind, and are welcomed to the memory as the offspring of philosophy. This compendium, presenting in a condensed form, pruned of all redundancies, the leading and important principles, rules, and definitions of law and equity, as laid down in the standard elementary works, will be found far more accurate and systematic than notes hastily taken by the student while reading the course, to say nothing of the immense saving of time and the advantage of print over writing. No index is furnished, because the work is. to

some extent, an index itself; besides, it is the desire of the author that the student shall not consider it as a book to be "tasted" merely, but to be thoroughly "chewed and digested;" he can scarcely skim it over if he would, for it is the cream of the law, gathered from the purest and highest sources known to legal science, and the diligent student will find it richer to his professional taste as he partakes of it from day to day. The author wishes here to repeat his closing remarks in the preface to the first edition—that this work is not intended as a substitute for text-books, but simply to lighten the labors and shorten the work of the student when he shall have carefully read the WHOLE COURSE and commenced his *review*, preparatory to final examination for the bar.

M. E. D.

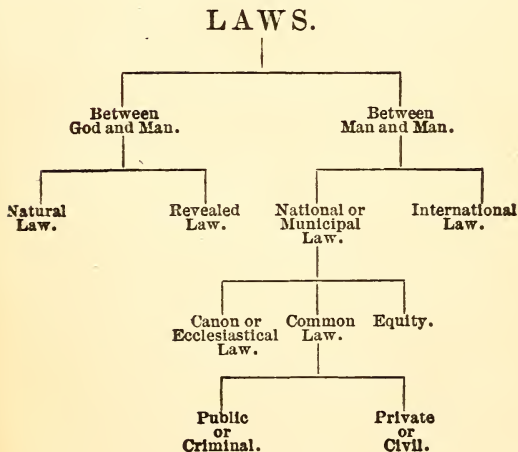
DECEMBER, 1878.

“The LORD is *our judge*, the LORD is *our law-giver*, the LORD is *our king*.”—*Isaiah xxxiii*.

LAW. “Her seat is the bosom of God; her voice is the harmony of the world; all things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempt from her power.”—*Hooker*.

THE SEVERAL DEPARTMENTS OR BRANCHES OF LAW

MAY BE THUS SHOWN :



SIR WILLIAM BLACKSTONE was born in Cheapside, London, July 10th, 1723, the third son of a silkman and bowyer.

Being in early life deprived of both parents proved, in its consequences, the reverse of misfortune, as to that circumstance probably he was indebted for his future opportunities for advancement.

He was educated at Oxford, under the care and assistance of his uncle; entered the Bar in 1746, and was chosen Vinerian Professor at Oxford in 1758; was a member of Parliament, and in 1770 a judge of the Common Pleas.

He died February 14th, 1780, in the fifty-seventh year of his age, a member of the Established Church.

BLACKSTONE began to execute his lectures on the Laws of England in 1753.

The first volume, under the title of *Commentaries on the Laws of England*, appeared in 1765.

COMMENTARIES
ON THE
LAWS OF ENGLAND,
BY
BLACKSTONE.

ABRIDGED.

BLACKSTONE'S ARRANGEMENT
OF THE
COMMENTARIES

IS AS FOLLOWS:

INTRODUCTION.

Of the *study* of the law.

The *nature* of laws in general.

The *grounds* and foundations of the laws of England.

The *countries* subject to those laws.

The *objects* of the laws of England, which are

RIGHTS AND WRONGS,

VIZ.:

THE RIGHTS OF PERSONS,	.	.	.	.	<i>Book I.</i>
THE RIGHTS OF THINGS,	.	.	.	.	<i>Book II.</i>
PRIVATE WRONGS,	.	.	.	.	<i>Book III</i>
PUBLIC WRONGS,	.	.	.	.	<i>Book IV.</i>

THE NATURE OF LAWS IN GENERAL.

LAW is a rule of action prescribed by superior power.

In its most general and comprehensive sense, it signifies a rule of action dictated by some superior, and which the inferior is bound to obey. It is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational; as, for example, we speak of the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations.

In its more confined sense, it denotes the rules, not of action in general, but of human action or conduct—that is, the precepts by which man, a creature endowed with both reason and a free will, is commanded to make use of those faculties in the general regulation of his behavior.

Law is “the perfection of reason—it always intends to conform thereto—and that which is not reason is not law.”

Justinian reduces the whole doctrine of law to these three general principles: “Live honestly, hurt nobody, and render to every one his just due.”

Natural law is the will of our Maker, and, regarded as a rule of human action or conduct, as prescribed by Him in nature, it is the eternal and immutable law of good and evil, *discoverable* by the light of reason, and founded in those relations of justice that existed in the nature of things antecedent to any positive precept.

Divine or revealed law, considered as a rule of action, is also the law of nature, imparted by God himself.

The law of nations is a system of rules deducible from reason and natural justice, and established by universal consent, to regulate the conduct and mutual intercourse between independent states.

It is also called "that code of public instruction which defines the rights, and prescribes the duties, of nations in their intercourse with each other."

MUNICIPAL OR CIVIL LAW is "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."

It is called a rule, *first*, because it is not a transient or sudden order from a superior to, or concerning, a particular person, but something permanent, uniform, and universal; *second*, to distinguish it from advice or counsel; *third*, to distinguish it from a compact or agreement, for a compact is a promise proceeding from us—law is a command directed to us.

It is called a rule of civil conduct to distinguish it from the natural and revealed law, the former being the rule of *moral* conduct, and the latter the rule of moral conduct and of *faith*.

It is a rule prescribed because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law.

It is prescribed by the supreme power in a state because legislation is the greatest act of superiority that can be exercised by one being over another.

Society is formed for the protection of individuals, and is founded in their *wants* and *fears*.

Governments and states are formed for the preservation of society. They are all reducible to three regular forms of government, viz.:

A Democracy, which generally has more public virtue, or goodness of intent, than other forms, but may be deficient in wisdom to contrive and strength to execute.

A Monarchy, which is the most powerful and dangerous of all governments.

An Aristocracy, which is supposed to have more wisdom than the other forms of government, but less honesty than a republic and less strength than a monarchy.

The British form of government partakes of the advantages of these *three*: the King, or Queen, representing the monarchical form; the House of Lords, the aristocratic form; and the House of Commons, the democratic form, of

Law in its Evil in themselves by the
law of nature, and Divine law! must
be.

shall prohibit **BLACKSTONE** by positive law ¹³ no made
- Statutes which inflict penalties for violating
government; these three elements united constituting the
English Parliament, or supreme power of that state. *trades*

A law consists of four parts, viz.: the declaratory, *without*
which defines what is right and wrong; the directory, which *having*
consists in commanding the observation of right or pro- *posed an*
hibiting the commission of wrong; the remedial, whereby *opportunity*
a method is pointed out to recover private rights or re- *ments*
dress private wrongs; and the vindicatory part, which
signifies what punishment shall be incurred by wrong-doers;
and in this consists the main strength and force of a law.

To interpret a law, we must inquire after the will or
intention of the maker, which is collected from the words,
the context, the subject-matter, the effects and consequences,
or the spirit and reason, of the law.

Words are generally to be understood in their most
known and usual signification—their general and popular
sense. Terms of art, or technical terms, must be taken
according to the acceptance of the learned in art, trade,
and science.

The context may aid in establishing the meaning of
words still dubious.

The subject-matter.—Words are always to be under-
stood as having a regard thereto, for it is always supposed
to be in the eye of the legislator, and all his expressions
directed to that end.

Of the effects and consequences, the rule is, that
when words bear either none or a very absurd signification,
if literally understood, we must a little deviate from the
received sense of them.

The reason and spirit of a law, considered, is the
most universal and effectual way of discovering its true
meaning, or the causes which moved its enactment; for
when the reason ceases, the law itself ought to cease.

EQUITY arises from this method of interpreting laws
by the reason and spirit of them. Grotius defines equity to
be "the correction of that wherein the law (by reason of
its universality) is deficient."

The object of equity is to give a more specific relief
than can sometimes be had, through the generality of both
the unwritten and written law, in matters of private right.

Equity *depends*, essentially, upon the particular circumstances of each case; hence there can be no established rules and fixed precepts of equity laid down without destroying its very essence and reducing it to *positive* law.

Courts of equity are necessary because, when the general decrees of the law come to be applied to particular cases, there should be vested somewhere the power of defining those circumstances which, had they been foreseen, the legislator himself would have expressed; but the liberty of considering all cases in an equitable light must not be indulged in too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge.

The purposes for which our courts of equity are established, and the matters with which they only are conversant, are: to *detect* latent frauds and concealments, which the process of the courts of law is not adapted to reach; to *enforce* the execution of such matters of trust and confidence as are binding in conscience, though not cognizable in a court of law; to *deliver* from such dangers as are owing to misfortune or oversight; and to give a *relief* more specific and better adapted to the circumstances of the case than can always be obtained by the generality of rules of the *positive* or *common* law.

They are only conversant in matters of property or private right.

OF THE LAWS OF ENGLAND.—The municipal law of England is divided into two kinds: the *lex non scripta*, the unwritten or common law; and the *lex scripta*, the written or statute law.

The unwritten or common law includes: *general customs*, or the common law, properly so called; *particular customs* of certain parts of the kingdom; and those *particular laws* that are, by custom, observed only in certain courts and jurisdictions.

General customs, or the common law, properly so called, are founded upon immemorial universal usage, whereof judicial decisions are the evidence, which decisions are preserved in the public records, explained in the year-books and reports, and digested by writers of approved authority.

The unwritten or common law, then, derives its *binding power* and the *force of law* from long and immemorial usage and universal reception throughout the kingdom.

The degree of antiquity necessary in a custom to entitle it to weight and authority is that it must have been used time out of mind, or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary.

The maxims and customs of the common law are to be *known*, and their *validity determined*, by the *judges* in the courts of justice. They are the depositaries of the laws, the living oracles, who must decide in all cases of doubt, and who are bound by oath to decide according to the law of the land.

Of precedents.—The doctrine of the law is that they *must be followed* unless flatly absurd, unjust, unreasonable, or clearly contrary to the *divine* law; for though the reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without due consideration.

PARTICULAR CUSTOMS are those which are only in use within some particular districts, as gavel-kind, the customs of London, etc.

The rules relating to particular customs are: *first*, they must be proved to exist; *secondly*, they must appear to be legal—that is, immemorial, continued, peaceable, reasonable, certain, compulsory, and consistent; and *thirdly*, they must, when allowed, receive a strict construction.

The seven necessary requisites to make a particular custom good or legal are: *first*, that it hath been used so long that the memory of man runneth not to the contrary; *secondly*, it must have been continued, for any interruption would cause a temporary ceasing, and the revival would give it a new beginning, which will be within time of memory, and thereupon the custom will be void; *thirdly*, it must have been peaceable and acquiesced in—not subject to contention and dispute; *fourthly*, customs must be reasonable, or rather, taken negatively, they must not be

unreasonable; *fifthly*, customs ought to be certain; *sixthly*, customs, though established by consent, must be (when so established) compulsory, and not left to the option of every man whether he will use them or not; and *seventhly*, customs must be consistent with each other—one custom cannot be set up in opposition to another.

The decisions of the courts of justice are the *evidence* of what is common law.

The *law* and the *opinion of the judge* are not always convertible terms, or one and the same thing, since it sometimes may happen that the judge may mistake the law.

The reports containing the decisions of the courts of England are extant in a regular series from the reign of Edward II. (1307) inclusive, and from his time to that of Henry VIII. (1509) they were taken at the expense of the Crown and published *annually*, whence they are known as *The Year-Books*.

Particular laws are such as, by special custom, are adopted and used only in certain peculiar courts, under the superintendence and control of the common and statute law, viz.: the Roman *civil* and *canon* law.

By the civil law is generally understood the civil or municipal law of the Roman Empire, as comprised in the Institutes, the Code, and the Digest of the Emperor Justinian, and the novel constitutions of himself and some of his successors. The former were compiled by Tribonian and other lawyers, by direction of Justinian, about A. D. 529. It took them three years, and consist of: *first*, the *Institutes*, which contain the elements or first principles of the Roman law, in four books; *secondly*, the *Digests* or *Pandects*, in fifty books, containing the opinions and writings of eminent lawyers; *thirdly*, a new *Code*, or collection of imperial constitutions, in twelve books; and *fourthly*, the *Novels*, or new constitutions posterior in time to the other books, and amounting to a supplement to the Code, containing new decrees of successive emperors; the whole forming the body of the *Roman Civil Law*.

The canon law is a body of Roman ecclesiastical law, relating to such matters as that Church either has, or claims to have, the proper jurisdiction over. It consists of the com-

piled opinions of the ancient Latin fathers, the decrees of general councils, and the decretal epistles and bulls or edicts of the Holy See.

The written or statute law—the *lex scripta*—is made by the supreme power in the state, to supply the defects, or amend what is amiss, of the unwritten law.

The courts in which the civil and canon laws are permitted to be used are: the Courts of the Archbishops and Bishops, and their derivative officers; the Military Courts; the Admiralty Courts; and the Courts of the Two Universities; but they are all under the superintendency of the *Courts of Common Law*.

Statutes are either general or special, public or private, and are declaratory of the common law, or remedial of small defects therein.

The rules to be observed in the construction of statutes are:

1st. There are three points to be considered in the construction of all remedial statutes, viz.: the *old law*, the *mis-chief*, and the *remedy*.

2d. A statute which treats of things or persons of an *inferior* rank cannot, by any general words, be extended to those of a *superior*.

3d. *Penal* statutes must be construed strictly.

4th. Statutes against *frauds* are to be *liberally* and *beneficially* expounded.

5th. One part of a statute must be so construed by another that the *whole* may stand, if possible.

6th. A *saving* totally repugnant to the body of the act is void.

7th. Where the common law and a statute differ, the common law gives place to the statute, and an old statute gives place to a new one.

8th. If a statute that repeals another is itself repealed afterwards, the first statute is thereby revived without any formal words for that purpose.

9th. Acts of Parliament derogatory from the power of subsequent Parliaments bind not.

10th. Acts of Parliament that are impossible to be performed are of no validity.

Phrase of a public act, is one which is not a private act, but one which affects the whole community. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons or persons concerned.

P. circuit of archbishops jurisdiction
D. " " bishops " "

Arch-deanries into rural deaneries, - which are circuit of 18 archdeacons **BLACKSTONE.**
Deanries into parishes

THE TERRITORY OF ENGLAND is divided into Ecclesiastical and Civil, or Lay.

P. that circuit of ground which is committed to the charge of one person or vicar or other minister having considerable therein
The ecclesiastical part is divided into provinces, dioceses, archdeaconries, rural deaneries, and parishes.

The civil divisions are into counties or shires, of which some are palatine; then into rapes, lathes, or tithings; next, into hundreds or wapentakes; and lastly, into towns, villis, or tithings. Ten families of freeholders made a town or tithing, ten tithings composed a hundred, and an indefinite number of these hundreds formed a county or shire.

Counties palatine were so called because the owners thereof had in those counties royal powers as fully as the King in his palace.

A city is a town in which is a corporation which is a both a town and a bishop
THE OBJECTS OF THE LAWS of England are Rights and Wrongs.

Rights are privileges; they are commanded to be observed by law, and are subdivided into the rights of persons, being those which concern and are annexed to the persons of men; and the rights of things, which are such rights as a man may acquire over external objects or things unconnected with his person.

borough is a town which is a corporation which is a both a town and a bishop
Wrongs are the privation of right; they are prohibited by law, and are divided into private wrongs, which, being infringements of particular rights merely, concern individuals only, and are called civil injuries; and public wrongs, which, being breaches of general and public rights, affect the whole community, and are called crimes and misdemeanors.

borough is a town which is a corporation which is a both a town and a bishop
For some *boroughs* sometimes have and are called wapentakes

For some *counties* there is an intermediate division between the shire and the hundred, as lathes in Kent and *seigns* in Sussex, each of them containing 3 or 4 hundreds
Where a county is divided into these intermediate jurisdictions they are called tithings.

BOOK I.

THE RIGHTS OF PERSONS.

ANALYSIS OF BOOK I.

The rights of persons; which are

- 1. Natural persons, whose rights are
 - 1. Absolute, viz.: the enjoyment of
 - 1. Personal security,
 - 2. Personal liberty,
 - 3. Private property.
 - 2. Relative; as they stand in relations
 - 1. Public; as
 - 1. Magistrates; who are
 - 1. Supreme,
 - 1. Legislative, viz.: the Parliament,
 - 2. Executive, viz.: the King, wherein of his
 - 1. Title,
 - 2. Royal family,
 - 3. Councils,
 - 4. Duties,
 - 5. Prerogative.
 - 6. Revenue.
 - 1. Ordinary, viz.:
 - 1. Ecclesiastical,
 - 2. Temporal.
 - 2. Extraordinary.
 - 2. Subordinate.
 - 2. People; who are
 - 1. Aliens, or
 - 2. Natives; who are
 - 1. Clergy, and
 - 2. Laity; who are in a state
 - 1. Civil,
 - 2. Military,
 - 3. Maritime.
 - 2. Private; as
 - 1. Master and servant,
 - 2. Husband and wife,
 - 3. Parent and child,
 - 4. Guardian and ward.
- 2. Artificial persons, viz.: bodies politic, or corporations;
 - 1. Ecclesiastical, or
 - 2. Lay; either of which may be
 - 1. Aggregate, or
 - 2. Sole.

BOOK I.

THE RIGHTS OF PERSONS, being such as concern and are annexed to the persons of men, when the persons *to whom* they belong, or are due, is regarded, are called (simply) *rights*, in the popular acceptance; but when we consider such as are due *from* every citizen, they are denominated (civil) *duties*.

Persons are divided by law into *natural* persons, or such as the God of nature formed us; and *artificial*, or such as are created by human laws for the purpose of society and government, which are called *corporations*, or bodies politic.

The rights of natural persons are: *absolute*, or such as belong to individuals; and *relative*, or such as are incident to them as members of society.

The absolute right of individuals are those rights which are so in their primary and strictest sense; such as would belong to their persons merely in state of nature, and which every man is entitled to enjoy, whether out of society or in it.

To protect individuals in the enjoyment of these absolute rights, which were vested in them by the immutable laws of nature, is the principal aim of society.

To maintain and regulate these absolute rights of individuals is the first and primary end of human laws.

Liberty is the general appellation for the natural rights of man, and every man gives up a part of his *natural liberty* when he enters into society as the price of so valuable a purchase.

Political or civil liberty is natural liberty, so far restrained by human laws as is necessary for the good of society.

The absolute rights of Englishmen have been declared and established, *first*, by the Charter of Liberties, obtained from

No subject of England can be constrained to pay any aids or taxes but such as are imposed by his own consent or that of his representatives in parliament.

BLACKSTONE

Duress — King John, called *Magna Charta*; afterwards, by the statute *confirmatio chartarum*, directing the great charter to be allowed as the common law; next, by a multitude of corroborating statutes; then, by the *Petition of Right*, the *Habeas Corpus Act*, and other salutary laws passed under Charles II; again, by the *Bill of Rights of 1688*; and lastly, by the *Act of Settlement*.

where a man actually loses his liberty **The absolute rights, or civil liberties, of men** are principally three, viz.: the right of personal security, the right of personal liberty, and the right of private property.

The right of personal security consists of a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

By limbs are meant only those members which may be useful to him in fight, and the loss of which alone amounts to mayhem by the common law.

Duress per minas is where a man, through fear of death or mayhem, is prevailed upon to execute a deed, or to do any other legal act. These may be afterwards avoided if forced upon him by a well-grounded fear of losing his life, or even limbs, in case of his non-compliance.

Civil death occurs when any man is banished by the process of common law, or abjures the realm, or enters into religion—i. e., into a monastery—and becomes a professed monk, in which cases he is absolutely *dead in law*, and his next heir shall have his estate.

The right of personal liberty consists in the free power of locomotion, without illegal restraint or banishment.

Lawful imprisonment is effected by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison, which warrant must be in writing, under the hand and seal of the magistrate, and express the cause of commitment, in order to be examined into by a *habeas corpus* if necessary. Coke says, "the law judges, like Festus, the Roman governor, that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him."

Habeas corpus is a writ requiring the body of a per-

son being by his royal prerogative may issue out his writ, &c. & prohibit any of his subjects from going into foreign parts without license

Supreme power divided - Legislation - Parliament
Executive - King alone. - Parliament and lords & common
council - M. 218 - "that whatever matter arises
concerning either house of parliament ought to be re-
solved, discussed and determined in that house to which
son imprisoned to be brought before the Court of King's
Bench or Common Pleas, who shall determine whether the
cause of commitment be just. M. 218 of making laws

The right of private property consists in the free
use, enjoyment, and disposal of one's acquisitions, without
any control or diminution, save only by law.

The relative rights, or relations of persons, as mem-
bers of society, are either *public* or *private*.

THE PUBLIC RELATIONS are those of *magistrates*
and *people*, the most universal relation by which men are
connected together being *government*.

Prerogative is that special pre-eminence which the
King hath over and above all persons, and out of the ordi-
nary course of the common law, in right of his regal dignity.

The people are divided into natives, or natural-born
subjects, aliens, and denizens.

Aliens are such as are born out of the realm, or alle-
giance, of the King.

Denizens are such born as aliens, but who have ob-
tained letters patent (naturalization) to make them subjects.

Natives, or natural-born subjects, are such as are born
within the dominions of the Crown of England—that is,
within the ligeance, or, as it is generally called, the *alle-
giance*, of the King.

The rights of natives are natural and perpetual;
those of aliens, local and temporary only, unless made
denizens.

The natives, or people proper, are divided into
the *clerical*, or *ecclesiastical*, which includes all persons in
holy orders or offices; and the *laity*, which comprehends
all the rest of the nation.

The laity are divided into the civil, the military, and
the maritime.

The civil state is divided into the *nobility* and *common-
alty*, and includes all the nation except the clergy, the army,
and the navy.

The degrees of the nobility are: dukes, marquises,
earls, viscounts, and barons.

The degrees of the commonalty are: vidames
(now quite out of use), knights, colonels, sergeants-at-law,

doctors, esquires, gentlemen, yeomen, tradesmen, artificers, and laborers.

Allegiance is the duty of all subjects, being the reciprocal tie or *ligamen* which binds the subject to the King in return for that protection which he affords them.

The oath of allegiance was the oath taken to a superior lord, or lord paramount, only, *without* any saving or exception whatever, to bear faith to one's sovereign lord, in opposition to all men, etc.

Faalty was the obligation on the part of the vassal to his *immediate* and superior lord.

The oath of fealty, or the feudal oath of fidelity, was the parent of our oath of allegiance, and was couched in almost the same terms as the oath of allegiance, but contained a *saving* or exception of the faith or allegiance due to the superior lord or King; hence it was the oath taken to the *inferior* lord.

Homage was the *submission* of the tenant or vassal to his lord, coupled with the oath and promise, and was performed by openly and humbly kneeling, ungirt, uncovered, and holding up his hands between those of the lord, and swearing that he "became his man from this day forward, for life, for limb, and worldly honor, and unto you shall be true and faithful, and bear you faith for the land I hold of you," etc., and then received a kiss from his lord.

THE PRIVATE RELATIONS of persons in society are: those of master and servant, husband and wife, parent and child, and guardian and ward.

Servants are menial or domestic; *apprentices* are usually bound for years; *laborers* are hired by the day or week, and are not part of the family; and *stewards, factors, or bailiffs*, the law considers as servants *pro tempore*.

The master has a property in the service of his servant, and must be answerable for such acts as the servant does by his express or implied command or assent.

Marriage the law regards in no other light than as a civil contract, and holds it good where the parties were able, willing, and did actually contract in the proper forms and solemnities required by law.

Disabilities to marriage are canonical or civil.

Canonical disabilities are: pre-contract; consanguinity, or blood relationship; affinity, or relationship by marriage; and some corporeal infirmities. They are sufficient, by the ecclesiastical law, to avoid the marriage in a spiritual court, but in our law they only make it voidable, and not *ipso facto* void until sentence of nullity be obtained.

The civil disabilities are: a prior marriage, want of age, non-consent of parents or guardians where requisite, and want of reason. They render the marriage void *ab initio*, and not merely voidable.

Marriage is dissolved by death or divorce. Divorce is of two kinds: *a vinculo matrimonii*, or from the bond of matrimony, which is total; and *a mensa et thoro*, or from bed or board, which is partial only.

Children are of two sorts: *legitimate* and *spurious*, or *bastards*.

The duties of parents to their children are: maintenance, protection, and education.

Legitimate children are those born in lawful wedlock, or within a competent time thereafter.

Bastards are those born out of lawful matrimony.

The main end and design of marriage is to ascertain and fix upon some certain person to whom the care, protection, maintenance, and education of children should belong.

Guardian and ward, a temporary relation between persons which the law hath provided, is a kind of artificial parentage, to supply the deficiency when it happens of the natural.

We have guardians *by nature*, or the parents; guardians *for nurture*; guardians *in socage*, or *by the common law*, which last two are only until the infant attains the age of fourteen; and guardians *by statute*, assigned by the father's will.

Full age in an infant, male or female, is twenty-one, which age is completed on the day preceding the anniversary of a person's birth.

An infant may be sued only under the protection and joining the name of his guardian, and an infant may sue either by his guardian, or *prochein amy* or next friend, who is not his guardian, but any person who will undertake the infant's case.

An infant, in respect to his tender years, has various *privileges* and various *disabilities* in law, chiefly with regard to suits, crimes, estates, and contracts.

An infant in ventre sa mere is considered in law, for many purposes, as born. It is capable of having a legacy, or a surrender of a copyhold estate, made to it; it may have a guardian assigned to it, and it is enabled to have an estate limited to its use, and to take afterward, by such limitation, as if it were then actually born.

CORPORATIONS, bodies politic or corporate, or *artificial* persons established for preserving in perpetual succession certain rights which, being conferred on natural persons only, would fail in process of time.

Their primary division is into *aggregate*, consisting of many members; and *sole*, consisting of but one, as a king, bishop, or parson.

Corporations, sole or aggregate, are either *ecclesiastical* or *spiritual*, erected to perpetuate the rights of the church; or *lay*, as a college, etc.

LAY CORPORATIONS are *civil*, erected for many temporal purposes; or *eleemosynary*, erected to perpetuate the charities of the founder.

Corporations are created generally by act of Parliament; by royal charter; and by prescription, of which the city of London is an instance—it has existed so long.

The powers incident to corporations are: to maintain perpetual succession; to act in their corporate capacity like an individual; to purchase and hold lands; to have a common seal, by which the corporation acts and speaks only; and to make by-laws or private statutes for its own government and regulation.

A corporation's privileges and disabilities are: it must always appear by attorney, being, as Coke says, "invisible;" it cannot maintain or be made defendant in a battery or like personal actions, nor commit crime in its corporate capacity, for it is not liable to corporeal penalties; it cannot be an executor, or perform any personal duties, for it cannot take the oath of due performance; it cannot be seized of lands to the use of another, for such kind of confidence is foreign to the end of its institution;

it cannot be committed to prison, outlawed, or excommunicated.

Corporations, as they cannot be arrested, are made to appear by distress on their lands and goods.

The duty of corporations is to answer the ends of their institution, which may be enforced by visitations.

A corporation may be dissolved by act of Parliament, by natural death of all its members, by surrender of its franchises, and by forfeiture of its charter—through negligence or abuse of its franchises.



BOOK II.

THE RIGHTS OF THINGS.

ANALYSIS OF BOOK II.

The rights of things, which consist in dominion over

1. THINGS REAL, in which are considered

1. Their several kinds, viz.:

- { 1. Corporeal, or
- { 2. Incorporeal.

2. The tenures by which they may be holden, viz.:

- { 1. Ancient, and
- { 2. Modern.

3. The estates therein, with respect to

1. The quantity of interest, viz.:

- { 1. Freehold.
 - { 1. Of inheritance, or
 - { 2. Not of inheritance.
- { 2. Less than freehold, and
- { 3. On condition.

2. The time of enjoyment, viz.: in

- { 1. Possession,
- { 2. Remainder, or
- { 3. Reversion.

3. The number and connection of the tenants, who may hold in

- { 1. Severalty,
- { 2. Joint tenancy,
- { 3. Coparcenary, or in
- { 4. Common.

4. The title to them, which may be gained or lost by

- { 1. Descent, or by
- { 2. Purchase; which includes

- { 1. Escheat,
- { 2. Occupancy,
- { 3. Prescription,
- { 4. Forfeiture, and

5. Alienation, by common assurances; which are by

- { 1. Deed, or matter IN PAIS, wherein of its
 - { 1. General nature, and
 - { 2. Several species.
- { 2. Matter of record,
- { 3. Special custom, and by
- { 4. Devise.

2. THINGS PERSONAL, or chattels, in which are considered

1. Their distribution,

2. Property therein,

3. Title to them, which may be gained or lost by

- { 1. Occupancy,
- { 2. Prerogative,
- { 3. Forfeiture,
- { 4. Custom,
- { 5. Succession,
- { 6. Marriage,
- { 7. Judgment,
- { 8. Gift or grant,
- { 9. Contract,
- { 10. Bankruptcy,
- { 11. Testament,
- { 12. Administration.

BOOK II.

THE RIGHTS OF THINGS are those rights which a man may acquire in, and to such external things as are unconnected with, his person.

Property, or the dominion of man over external objects, has its *origin* from the *Creator*, as his gift to mankind.

The *substance* of things was, at first, common to all; yet a *temporary* property in the *use* of them might even then be acquired and continued *by occupancy*. In process of time a *permanent* property was established in the *substance*, as well as the *use*, of things, which was also originally acquired by occupancy only.

Lest this property should determine by the owner's dereliction or death, whereby the thing would again become common, societies have established conveyances, wills, and heirships, in order to continue the property of the first occupant; and where, by accident, such property becomes discontinued or unknown, the thing usually results to the sovereign of the state by virtue of the municipal law.

Things are divided into *things real* and *things personal*.

THINGS REAL are such as are of a permanent, fixed, and immovable nature, and cannot be carried out of their place, as lands and tenements.

Things personal are such as goods, money, and other movables, which may attend the owner's person wherever he may choose to go.

Things real are usually said to consist in lands, tenements, and *hereditaments*.

Land is a term comprehending all things of a permanent, substantial nature being a word of very extensive signification.

Land has, in its legal signification, an indefinite extent

upwards as well as downwards—*cujus est solum, ejus est usque ad cælum*—so that the word *land* includes not only the face of the earth, but everything under it or over it; and by the name of *land* everything terrestrial will pass.

Tenement is a word of still greater extent than land, and, in its original proper and legal sense, it signifies *anything that may be holden*, provided it be of a permanent nature, whether it be of a substantial and sensible, or of an unsubstantial, ideal kind.

Hereditament is by much the largest and most comprehensive expression, for it includes not only lands and tenements, but *whatsoever may be inherited*, be it corporeal or incorporeal, real, personal or mixed.

All the several kinds of things real are reducible to one of these three, viz.: lands, tenements, or hereditaments, whereof the second includes the first, and the third the first and second.

Things real may be considered with reference to their several *kinds*; the *tenures* by which they may be holden; the *estates* therein; and their *title*, or the means of acquiring and losing them.

THE KINDS OF THINGS REAL are *corporeal* or *incorporeal*, which is also the division of *hereditaments*—the most comprehensive denomination of things real.

Corporeal hereditaments are such as affect the senses—may be seen and handled by the body; they consist wholly of *permanent* and *substantial objects*, all of which may be comprehended under the general denomination of *land* only.

Incorporeal hereditaments are not the objects of sensation—can neither be seen nor handled; are creatures of the mind, and exist only in contemplation. *They are rights* issuing out of things corporate, whether real or personal; or concerning, or annexed to, or exercisable within, the same.

They are principally of ten sorts, viz.: advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents.

An advowson is the right of presentation to a church or ecclesiastical benefice, either *appendant*—i. e., annexed to the possession of the manor (lords of manor being original,

the only founders and patrons of churches)—or *in gross*, as where separated from the *property* of the manor and annexed to the *person* of the owner, and not to his manor or lands.

Advowsons are also either *presentative*, where the patron has a right of presentation, and to demand of the bishop to institute his clerk if qualified; *collative*, where the bishop and patron are one and the same, in which case the bishop cannot present to himself, but does by the act of collation all that is done by institution and induction; or *donative*, as where the King, or any subject by his license, doth found a church, and ordains that it shall be merely in the gift or disposal of the patron, subject to his visitations only, and not that of the ordinary, and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction.

Tithes are the tenth part of the yearly increase arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants.

“Time of memory” has long ago been ascertained, by law, to commence from the beginning of the reign of Richard I.

Tithes are either *predial*, as corn, grass, hops, and wood; *mixed*, as wool, milk, pigs, etc.; or *personal*, as of manual occupations, trades, fisheries, and the like.

Common is a right or profit which a man has in the land of another, as to feed his beasts, catch fish, dig turf, and the like. It is chiefly of four kinds, viz.:

Common of pasture is a right of feeding one's beasts on another's land, and is either *appendant*, as when inseparably incident to the grant of the lands; *appurtenant*, where it arises from no connection of tenure or absolute necessity, but *may* be annexed to lands, or extended to other beasts besides such as are generally commonable, as hogs, goats, etc., which neither plow nor manure the ground; *of vicinage*, where the inhabitants of two contiguous townships have intercommoned to prevent suits; or *in gross*, where it is annexed to a man's person instead of to land.

Common of piscary is a right of fishing in another man's water.

Common of turbary is a right of digging turf on another's ground.

Common of estovers, or botes, is a right of taking necessary wood from off another's estate.

Ways are a right of passing over another's ground, and has reference only to private ways. They may be founded on permission, grant, and prescription, or may arise from act and operation of law.

Offices are the right to exercise a public or private employment, and to take the fees and emoluments pertaining thereto.

Dignities are titles to honor, and bear a near relation to offices.

Franchises are a royal privilege, or branch of the King's prerogative, subsisting in the hands of the subject.

Franchise and *liberty* are used as synonymous terms.

Corodies are allotments of provisions for one's sustenance, which may be converted into *pensions*.

Annuity is a yearly sum of money charged upon the *person*, and not upon the lands, of the grantor.

Rents are certain profits issuing yearly out of lands and tenements corporeal. The rents at common law were rent-service, rent-charge, and rent-seck.

Rent-service is so called because it has some corporeal service incident to it; as, at least, fealty or the feudal oath of fidelity.

Rent-charge is where the owner of the rent has no future interest or reversion expectant in the land, and it is called a rent-charge because the land was charged with a distress for the payment of the rent.

Rent-seck, or barren rent, is a rent reserved by deed, but without any clause of distress.

Rents of assise are the certain established rents of the freeholders and ancient copyholders of a manor, which cannot be departed from or varied. Those of the freeholders were frequently called *chief-rents*, and those of both indifferently denominated *quit-rents*, because thereby the tenant goes quit and free of all services. When the quit rents were reserved in silver they were called *white-rents*,

in contradistinction to rents reserved in work, grain, or baser money, which was called *black-mail*.

Rack-rent is a rent of the full value of the tenement, or near it.

A fee-farm rent is a rent-charge issuing out of an estate in fee of at least one-fourth of the value of the lands at the time of its reservation.

TENURES BY WHICH THINGS REAL MAY BE HOLDEN.

The English doctrine of tenures is derived from the *feudal law* or *system*, which had its origin from the military policy of the Northern or Celtic nations—the Goths, Huns, Franks, Vandals, Lombards, etc.—who, all migrating from the same *officina gentium*, poured themselves in vast quantities into all the regions of Europe at the declension of the Roman Empire. Bringing this policy from their own countries, they continued it in their new acquisitions as the most likely means of securing them.

Feuds, fiefs, or fees—in their original synonymous—were allotments of large districts or parcels of land made by the conquering chief or general to the superior officers of their armies, and by *them* dealt out again, in smaller parcels, to the inferior officers and most deserving soldiers under them.

The appellation *feud*, *fief*, or *fee*, signified in the Northern language a conditional *stipend* or *reward*, and the condition annexed to them being that the possessor should do service faithfully for them to him who gave them, both at home and in wars, for which purpose he took the feudal oath of fealty, and in case of breach of this oath or condition the lands reverted to him who granted them.

The universality and early use of this feudal plan among all those nations, which, in complaisance to the Romans, we still call barbarous, may appear from what is recorded of the Cimbri and Teutons, nations of the same Northern origin as those we have been describing, at their first irruption into Italy, about a century before the Christian era. They demanded of the Romans stipendiary lands or feuds to be allotted to them, to be held by military and other personal services, whenever their lord should call upon them. *This* was evidently the same constitution

that displayed itself more fully about seven hundred years afterwards, when the Salii, Burgundians, and Franks broke in upon Gaul, the Visigoths upon Spain, and the Lombards upon Italy, and introduced with themselves this Northern plan of polity as best serving to distribute and protect the territories they had newly gained. Hence the Emperor Alexander Severus took the hint of dividing lands conquered from the enemy among his generals and victorious soldiery, on condition of receiving military service from them and their heirs forever.

The wisdom and efficiency of this policy of the victorious Northerners alarmed all the princes of Europe, and made them think it necessary to enter into the same plan with *their* subjects, whose possession before was perfectly *allodial*—that is, independent, and held of no superior; and thus **in a few years the feudal constitution or doctrine of tenures extended itself over all the western world**, which alteration of landed property in so material a point drew after it an alteration of laws and customs, so that the feudal laws soon drove out the Roman, which had hitherto so universally obtained, but now became for many centuries lost and forgotten.

But this feudal polity, thus by degrees established over all Europe, was not received universally into that part of the island called *England* until the reign of William the Norman, for the Saxons were firmly settled in the island as early as the year 600, and it was not till two centuries after that feuds arrived at full vigor in Europe.

This introduction of the feudal tenures into England by King William does not appear to have been effected immediately after his conquest, nor by the mere arbitrary will and power of the conqueror, but to have been gradually established by the Roman barons and others, and afterwards universally consented to by the great council of the nation, long after his title was established, upon the principle of self-security.

In consequence of this change it became a fundamental *maxim* and *necessary principle*—though in reality a mere *fiction*—of our English tenures, “that *the King* is the universal lord and original proprietor of all the lands in his kingdom,

and that no man doth or can possess any part of it but what has mediately or immediately been derived as a *gift from him*, to be held upon feudal services.”

In this system of tenure, in general, *the grantor* was called the proprietor or *lord*, and retained the dominion or ultimate property of the feud or fee; and the grantee, who had only the use or possession, was styled the feudatory or *vassal*, which was only another name for the tenant or holder of the lands.

The King—the *original* grantor—was styled the *lord paramount*, or over all; those who held immediately under him being styled his tenants *in capite*, or in chief; and they who held under these *mesne* or middle lords were styled tenants *parvail*, or the lowest tenants, who made the *avail* or profit from the land.

The feudatories were styled *pares curtis*, or *pares curiæ*, because the lord was the legislator and judge over his feudatories.

The manner of granting a feud was by words of gratuitous and pure donation, being perfected by the ceremony of corporeal investiture, or open and notorious delivery of possession in the presence of the other vassals, called *livery of seizin*.

Feuds were not at first hereditary, though frequently granted by favor of the lord to the children of the former possessor, till, in process of time, it became unusual, and was, therefore, thought hard to reject the heir if he were capable to perform the service; and, therefore, infants, women, and monks, who were incapable of bearing arms, were also incapable of succeeding to a genuine feud, and it was for *this* reason that women did not receive the attention, consideration, or privileges, pertaining to property that men did, and many of their disabilities in law to this day may be traced back to this origin, for previous to the introduction of this system the privileges of women in England were generally about the same as those of the men. This succession of the children to their father's feud, or *descent* of the feud, originally extended to *all* the males alike; but, being found inconvenient, and also tending to weaken the strength of the feudal union by

multiplicity of these divisions among so many heirs, *honorary feuds*, or *titles of nobility*, were introduced, which were not divisible, and could be inherited only by the eldest son, *in imitation of military feuds*.

Neither lord nor vassal could alien his estate without the consent of the other, because the feudal obligation was looked upon as reciprocal.

The feudatories often found it necessary to commit part of *their* lands to inferior tenants, and obliged such to make *returns* in service, corn, cattle, or money, which returns were the origin of *rents*, which were called improper feuds.

THE ANCIENT ENGLISH TENURES, or the manner in which lands, tenements, and hereditaments were held until the middle of the last century.

Tenure denotes the manner of *holding* or possessing property.

Tenement is the thing holden.

Tenant, the *person* holding lands or tenements by any title.

The *distinction* of tenures consisted in the *nature* of the services or renders that were due to the lords from their tenants.

The services, in respect of their quality, were either *free* or *base*; and, in respect of their quantity and time of exacting them, were either *certain* or *uncertain*.

Free services were such as were not unbecoming the character of a soldier or a freeman to perform, as to serve under his lord in the wars, to pay a sum of money, and the like.

Base services were such as were fit only for peasants or persons of a servile rank, as to plow the lord's lands, make his hedges, etc.

Certain services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence, as to pay a stated annual rent, or to plow such a field for three days.

Uncertain services depended upon unknown contingencies, as to do military service in person, pay an assessment in lieu of it, or wind a horn whenever the Scots invaded the realm, which were free services; or to do whatever the lord should command, which was a base or villein service.

From the various combinations of these services have arisen the four principal species of ancient lay tenures which subsisted in England till the middle of the last century, and three of which subsist to this day; hence the *feudal clogs, though greatly lessened, still cling to English property.*

Bracton, who wrote under Henry III., gives the clearest account of these ancient tenures, of which the following is an outline or abstract, viz.:

“**Tenements** are of two kinds: *frank-tenements* and *villenage*.

“**Of frank-tenements**, some are held freely in consideration of homage and *knight-service*; others, in *free-socage*, with the service of fealty only.

“**Of villenages**, some are *pure* and others *privileged*; he holding in *pure villenage* doing whatever is commanded of him, and always bound to an *uncertain* service; and in *privileged villenage*, or *villein-socage*, the villein-socmen do villein services, but such as are *certain* and determined.”

From the sense of which the four principal kinds of *ancient* English tenures appear to have been, viz.:

Tenure in chivalry, or by knight-service, where the service was *free*, but *uncertain*, as military service with homage.

Tenure in free-socage, where the service was not only *free*, but *certain*, as fealty only, or by rent and fealty.

Tenure in pure villenage, where the service was *base* and *uncertain*.

Tenure in privileged villenage, or *villein-socage*, where the service was *base*, but reduced to a *certainty*.

The most universal ancient tenure was that in *chivalry*, or by *knight-service*, to make which a determinate quantity of land was necessary, called a knight's *fee*—*feodum militare*—and differed in but very few points from a pure or proper feud—being entirely military, the tenant or knight being bound to attend his lord forty days in every year, if called upon, as his *reditus* or return, or his rent, or service, for the lands he held. It was granted by livery and perfected by homage and fealty.

The seven fruits and consequences of knight-

service, or tenure in chivalry, inseparably incident to it, were: aids, reliefs, primer-seizin, wardship, marriage, fines for alienation, and escheat.

Aids were principally *three*: to ransom the lord's person if taken prisoner, to make the lord's eldest son a knight, and to marry the lord's eldest daughter by giving her a suitable portion. Aids were originally mere *benevolences*, granted by the tenant to the lord in times of difficulty and distress, but in process of time they grew to be considered as a matter of right, and not of discretion.

Reliefs were a fine, or composition with the *lord*, for taking up the estate, which, by the feudal law, was lapsed or fallen in by the death of the tenant.

Primer-seizin was a right which the *King* had, whenever any of his tenants *in capite* died seized of a knight's fee, to receive of the heir, if he were of age, a whole year's profits of the lands if they were in possession, and half a year's profits if in reversion expectant on an estate for life.

Wardship.—When the heir was under age the lord was entitled to wardship, and was called guardian in chivalry. It consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males and sixteen in females, for the feudal law considered him incapable of knight-service till of age, or twenty-one.

Marriage, or the tendering of a suitable match to their infant wards, was another right the lord had, which, if they refused, they forfeited the value of the marriage to their guardian. This custom grew from the fear of their marrying the lord's enemy.

Fines were due the lord for every alienation of the tenant whenever he had occasion to make over his land to another, which he could not do, however, without the consent of the lord. The lord, also, could not alien his seigniority without the consent of his tenant, which consent was called his *attornment*, for the feudal obligation was looked upon as reciprocal.

Escheat is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant, from

the extinction of the blood of the latter, by either natural or civil causes, in which case the land *escheated*, or fell back, to the lord of the fee.

Tenure by grand-serjeanty was where the tenant was bound to do some special *honorary* service to the King *in person*, as to carry his banner, his sword, or the like; or be his butler, champion, or other officer, at his coronation.

Tenure by cornage was a species of grand-serjeanty, and consisted of winding a horn when the Scots and other enemies entered the land, in order to warn the King's subjects.

Escuage, or scutage, was a *pecuniary* satisfaction instead of military service which tenants found means of *substituting* in lieu of the more troublesome *personal attendance* of knight-service. This pecuniary substitute came at last to be levied by assessments, at so much for every knight's fee; but by the laws of Edward I. and Magna Charta no *scutage* could be levied without the consent of Parliament, these *scutages* being the groundwork of all succeeding subsidies, and the *land tax* of later times. By this degeneration of *personal* military duty into *pecuniary* assessments the advantages of the feudal constitution were destroyed.

THE MODERN ENGLISH TENURES are those of the ancient or original English tenures which remained after the destruction of the military or most oppressive of the feudal tenures, which was accomplished at a single blow by the statute 12, Charles II., whereby all tenures except *frank-almoigne*, grand-serjeanty, and copyholds were reduced to one general species of tenure, called *free and common socage*.

This statute of Charles II. was even a greater acquisition to the civil property of the kingdom than Magna Charta itself, since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved the vigor of them, but the statute of Charles II. extirpated the whole, and demolished both root and branch.

The word *socage* is derived from the Saxon appellation *soc*, which signifies liberty or privilege, and, being joined to a usual termination, is called *socage*; in Latin *socagium*, signifying a *free and privileged tenure*.

Socage, in its most general and extensive signification,

TABLE OF TENURES.

LAY TENURES.

I. Frank-tenement, or freehold.	{	1. Military tenures (abolished except grand-serjeanty, and reduced to free-socage tenures).	{	1. Knight-service proper, or tenure in chivalry.
				2. Grand-serjeanty, one species of which is cornage.
II. Villenage.	{	2. Free-socage, or plough service.	{	1. Petit-serjeanty.
		1. Pure villenage (whence copyholds at the lord's [nominal] will, which is regulated according to custom).		2. Tenure in burgage.
				3. Gavel-kind.
		2. Privileged villenage, sometimes called villein-socage (whence tenure in ancient demesne, which is an exalted species of copyhold, held according to the lord's will), and is of three kinds.	{	1. Tenure in ancient.
				2. Privileged copyholds, customary freeholds, or free copyholds.
				3. Copyholds of base tenure.

SPIRITUAL TENURES.

- I. Frankalmoinage, or free alms. | II. Tenure by divine service.

seems to denote a tenure by any certain and determinate service.

This tenure includes petit-serjeanty, tenure in burgage, and gavel-kind.

Free-socage tenures partook strongly of the feudal nature, as well as those in chivalry, the lands being holden subject to some *service*—at least to fealty and suit of court—and subject to reliefs, wardships, and escheat, but not to marriage. They were also formerly subject to aids, primer-seizin, *fines* for alienation, and escheat, except in gavel-kind.

Socage tenures were plainly the relics of Saxon liberty, retained by such persons as had neither forfeited them to the King, nor been obliged to exchange them for, as it was called, the more honorable, but more troublesome, tenure of knight-service. This is peculiarly remarkable in the tenure prevailing in Kent, called *gavel-kind*, which is generally acknowledged to be a species of socage tenure, the preservation whereof from the innovations of the Normans is a fact universally known.

The service must be *certain* to denominate it *socage*, and the important distinction between tenure by knight-service and tenure in socage is, that where the services were *free* and *honorable*, but *uncertain* as to the *time of their performance*—as military service, cornage, and the like—it was called *tenure in knight-service*, or *chivalry*; but where the service was not only *free*, but also *certain*—as by fealty only, or by rent and fealty—this was *tenure by free-socage*, or *liberum socagium*.

Petit-serjeanty consisted of holding lands of the King by the rendering to him annually some small implement of war, as a bow, sword, lance, arrow, and the like. It differs from grand-serjeanty in that the latter was a *personal service* instead of a *tribute service* or *render*. Their resemblance is that both tend to some purpose relative to the King's person.

Tenure in burgage is where the King or other person is lord of an ancient borough, in which the tenements are held by a rent certain. It is a kind of *town-socage*; as common-socage, by which other lands are holden, is usually of a *rural* nature.

Borough English is an incident of burgage tenure, and provides that the *youngest* instead of the eldest son shall succeed to the burgage tenement on the death of his father by reason of the custom of *marcheta*.

Gavel-kind is also a species of socage tenure, modified by the customs of the country, the lands being holden by *suit of court* and *fealty*, a service in its nature *certain*.

The distinguishing *properties* of *gavel-kind* (which before the Norman conquest was the general custom of the realm) are various, the principal of which is that the tenant is of age sufficient to alien his estate by feoffment at the age of *fifteen*. The estate *does not escheat* in case of an attainder and execution for felony. In most places the tenant could *devise his lands* by will before the statute for that purpose was made. The lands *descended to all the sons together*, which indeed was anciently the course of descent over all England, though in some particular places particular customs prevailed.

That *socage tenures* partake of *feudal nature* or origin, as apparent from a comparison of their incidents and consequences with those of tenure in *chivalry*, probably arises from its more ancient Saxon original; since, as before observed, feuds were not unknown among the Saxons, though they did not form a part of their military policy, nor were they drawn out into such arbitrary consequences as among the Normans.

Villeins were a sort of people in downright servitude under the Saxon government, who were not only used and employed in the most servile works, but *belonged*, both they and their children and effects, to the lord of the soil, like the cattle or stock upon it. They were either *regardant*—that is, annexed to the manor or *land*; or else *in gross*, or *at large*—that is, annexed to the *person* of the lord. They were transferable by deed from one person to another, but could acquire no property in land or goods. The law, however, protected the *persons* of villeins as the King's subjects against atrocious injuries of the lord.

Pure villenage, then, was a precarious and *slavish* tenure, at the absolute will of the lord, upon *uncertain services* of the *basest* nature.

Copyhold tenures were the tenures of those descended

from, or who were originally, villeins, but who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates which before were held absolutely at the will of the lord, which customs were evidenced by the rolls of the courts baron, in which they were entered and kept on foot by the constant immemorial usage of the manors in which the lands lay; so they began to be called *tenants by copy of court-roll*, and the tenure, a *copyhold*. These tenures were subject, like *socage* tenures, to service, relief, and escheat; also to *heriots*, wardship, and fines upon descent and alienation.

Privileged villenage, or villein-socage, is an exalted species of copyhold tenures upon *base*, but *certain*, services. The tenants could not alien or transfer their tenements by grant or feoffment any more than pure villeins could. It was a tenure subsisting only in the ancient demesne of the Crown, whence it is also denominated the *tenure of ancient demesne*. These exalted species of *copyhold tenures of ancient demesne* have divers immunities annexed to them, but are still held by copy of court-roll, but according to the custom of the manor, and not the will of the lord.

Ancient demesne consists of those lands or manors which, though now perhaps granted out to private subjects, were actually in the hands of the Crown in the time of Edward the Confessor or William the Conqueror, and so appear to have been, by the great survey called Domesday-book, compiled about the nineteenth year of William I.

Tenure in frankalmoigne, or free-alsms, is that whereby a religious corporation, aggregate or sole, holdeth lands of the donor to them and their successors forever.

ESTATES IN THINGS REAL.—An estate in lands, tenements, or hereditaments, signifies such *interest* as the tenant has therein, to ascertain which we consider the *quantity of interest*, the *time of enjoyment*, and the *number and connection of the tenants*.

The quantity of interest is measured by its *duration* and *extent*, thus: either the tenant's right of possession is to subsist for an uncertain period of his own life, or the life of another; to determine at his own decease, or to remain to his descendants after him; or it is circumscribed

within a certain number of years, months, or days; or, lastly, it is infinite and unlimited, being vested in him and his representatives forever. This occasions the primary division of estates into *freehold* and *less than freehold*. There is also another species, called estates *upon condition* (whether freehold or otherwise), whose existence depends upon the happening or not happening of some uncertain event.

An estate of freehold—*liberum tenementum*, or *frank-tenement*—is such as is created by *livery of seizin* at common law; or, in tenements of an incorporeal nature, by what is equivalent thereto.

Estates of freehold are divided into estates of *inheritance* and *not of inheritance*.

Estates of inheritance are divided into **inheritances absolute**, or *fees-simple*; and **inheritances limited**, or *limited fees*.

Of inheritances absolute, or fees-simple, in freehold estates of inheritance.

A tenant in fee-simple, or *tenant in fee*, is he that hath lands, tenements, or hereditaments, to hold to him and his heirs forever—generally, absolutely, and simply—without mentioning what heirs, but referring that to his own pleasure or the disposition of the law.

Fee—*feodum*—in its **true and original meaning**, is the same as *feud* or *fief*, and, in its primary sense, was taken in *contradistinction* to *allodium*, as now used. *Fee* then meant that which was held of some superior, on condition of rendering him service, and in which superior the ultimate property, or real ownership of the land, resided. A subject, therefore, had only the usufruct, and not the absolute property, of the soil. We express the strongest and highest estate that *any* subject can have by the words, “he is seized thereof, *in his demesne, as of fee*.” It is a man’s *demesne*, or property, since it belongs to him and his heirs forever; yet it is his *demesne as of fee*, because it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides.

A *fee*, therefore, in general, signifies an estate of inheritance, being the highest and most extensive interest that a man can have in lands.

A tenant in fee-simple is he that hath lands and tenements to hold to him and his heirs forever.

Fee-simple now signifies a lawful or pure inheritance, *fee* signifying inheritance, and *simple* is added for that it is descendible to his heirs *generally*—that is, *simply*, without restraint. The word *simple* is also annexed to *distinguish it from other fees*, as fee-tail, fee-conditional, and the like.

A fee, then, is an estate of inheritance in law, belonging to the owner, and transmissible to his heirs, and is an estate that may continue forever.

In order to make a *fee* or *inheritance*, the word “*heirs*” is necessary in the grant; for if lands be given to a man forever, or to him and his assigns forever, this vests in him but an estate for life only. The *exceptions* to this rule are: *devises by will*; *finés and recoveries*, considered as a species of conveyance; in creations of nobility by writ, though when by patent the word must be inserted; in grants to sole corporations; and in case of the King.

Inheritances, limited or limited fees, are divided into *qualified* or *base fees*, and *fees-conditional*—so called at common law, and afterwards, in consequence of the statute *de donis*, *fees-tail*.

Limited fees are such estates of inheritance as are clogged and confined with conditions or qualifications of any sort.

A base or qualified fee is one having a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end; as, if a grant be made to A and his heirs, *tenants of the Manor of Dale*, whenever the heirs of A cease to be tenants of that manor the grant is entirely defeated.

A conditional fee, at the common law, was a fee *restrained to some particular heirs*, exclusive of others; as, to the *heirs of a man's body*, by which only his *lineal* descendants were admitted, in exclusion of collateral heirs; or to the *heirs male of his body*, in exclusion of both collaterals and lineal females also.

It was called a conditional fee by reason of the condition expressed or implied in the

donation of it, that if the donee died without such particular heirs the land should *revert* to the donor.

Now the *condition* annexed to these fees by the common law, when performed, is entirely gone, and the fee to which it was before annexed and *qualifying* became *absolute*—e. g., a gift to a man and the heirs of his body was a gift upon condition that it should revert to the donor if the donee had not the heirs prescribed, but to remain to him if he had such heirs; hence as soon as the donee had the required heirs born to him, his estate was no longer conditional, but became absolute by the performance of the condition.

It was, therefore, construed at common law to be, and called, a fee-simple on condition that the donee had the heirs prescribed.

The donee of a conditional fee had the power to *convey*, or *alien in fee*, as soon as the condition was *performed*, and *thereby debar his own issue*, and also the possibility of a *reversion* to the donor. Now this right of alienation by the donee was repugnant to the nobility, who were anxious to perpetuate their possessions, and they alleged that it was a breach of the condition for the grant or gift. They, therefore, procured the passage of the Statute of Westminster the Second (1272), commonly called the statute *de donis conditionalibus*, for the express purpose of preventing the donee of a *conditional fee* from aliening the land as soon as issue was born, and for the purpose of securing the *reversion* to the grantor. (This statute, therefore, provided that the lands or tenements given to the donee and the heirs, or certain heirs, of his body should, in every event, go to such *issue* if there were any, or, if none, should *revert* to the donor.)

The origin of fee-tail and reversion is from the construction given by the judges to this statute *de donis*; they determining that the donee had no longer a *conditional fee-simple*, which became absolute and at his own disposal the instant any issue was born; but **they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a fee-tail**, and vested in the donor the *ultimate fee-simple* of the land, *expectant* on the failure of issue, which expectant estate we now call a *reversion*.

A fee-tail, then, in its original, was a conditional fee shorn of the right of alienation after condition performed, and vesting in the donor an indefeasible reversion.

Donor is, properly, one who gives lands to another in *tail*.

A *fee-tail* is so called because it is *entailed*—that is, *limited* as to how long it shall continue.

The word “*body*,” or some other words of procreation, are necessary to make a *fee-tail* in order to ascertain to what particular heirs the fee is limited or restrained.

So if a grant be made to a man and his *issue of his body*, to a man and his seed, to a man and his *children* or *offspring*, all these are only estates for life, there wanting the words of inheritance, “his heirs.”

Estates-tail are either *general* or *special*, *male* or *female*, or given in *frank-marriage*.

Tail-general is where lands and tenements are given to one and the heirs of his body begotten, because, how often-soever such donee may be married; his issue in general by all and every such marriage is in successive order capable of inheriting the estate-tail, *per formam doni*.

Tail-special is where the gift is restrained to certain heirs of the donee’s body, and does not go to all of them in general; as, if lands be given to a man and the heirs of his body, *on Mary his now wife to be begotten*.

Tail-male general is where lands are given to a man and his heirs male of his body begotten.

Tail-female special is where lands are given to a man and the heirs female of his body on his present wife begotten.

In case of an entail *male*, the heirs *female* shall never inherit, nor any derived from them; nor *e converso*, the heirs *male* in case of a gift in *tail-female*.

Frank-marriage is where tenements are given by one to another, together with a wife, who is the daughter or cousin of the donor, to hold in *frank-marriage*. By such gift, though nothing but the word *frank-marriage* is expressed, the donees shall have the tenements to them and the heirs of their two bodies begotten—that is, they are tenants in *special tail*.

The inconveniences resulting from this tying up of the

landed property by *estates-tail* were avoided about two hundred years after the enactment of the statute *de donis* by the invention of *finés* and *common recoveries*, which removed the limitations upon them, and passed an absolute and pure fee-simple.

Freehold estates not of inheritance are for *life* only. They are either *conventional*, expressly created by the act of the parties; or *legal*, created by construction and operation of law.

Conventional estates for life are created by an express deed or grant, whereby a lease of lands or tenements is made to a man to hold for the term of his own life, or for that of any other person, or for more lives than one, in any of which cases he is called *tenant for life*; when he holds the estate by the life of another he is usually called *tenant pur autre vie*.

It is a rule of law that all grants are to be taken most strongly against the grantor, unless in the case of the King.

An estate is granted to one for the term of his "natural life" generally, because it may be determined by his *civil* death if granted for "his life" only; but one's natural life can only be determined by his *natural* death.

Incident to *all* estates for life are *estovers* and *emblements*.

If a tenant for life sows the land and dies before harvest, this is a determination of the term by the act of God, and he, or rather his personal representatives, are entitled to the *emblements*, or growing crops.

The legal estates for life are *tenancy in tail after possibility of issue extinct*, *tenancy by the curtesy of England*, and *tenancy in dower*.

Tenancy in tail after possibility of issue extinct occurs where one is a tenant in special tail, and a person from whose body the issue was to spring dies without issue, or, having left issue, that issue becomes extinct.

Tenancy by the curtesy of England is where a man marries a woman seized of an estate of inheritance—that is of lands and tenements in fee-simple or fee-tail—and has by her issue born alive, which was capable of inheriting her estate; in this case he shall, on the death of his wife, hold the lands for his natural life as *tenant by the curtesy*.

The four *requisites* necessary to make a tenancy by the curtesy of England are: *marriage, seizin of the wife, issue, and death of the wife.*

Tenancy in dower is where a woman's husband is seized of an estate of inheritance, of which her issue might by any possibility have been heir, and the husband dies; in this case the wife shall have the third part of all the lands and tenements whereof he was seized at any time during coverture, to hold for her natural life.

Dower was either by *common law* or that just described; by *particular custom*—as, that the wife should have half the husband's lands, or, in some places, the whole, and in some only a quarter; *dower ad ostium ecclesiæ*, which is where the person openly at the church door endowed the wife with such quantity as he pleased of his lands, to be enjoyed after his death; or *dower ex assensu patris*, which is only a species of the kind last mentioned, and is made when the husband's father is alive, and the son, by his consent, endows his wife with parcel of his father's lands.

The most usual species of dower was that by common law.

Dower may be barred or prevented in various ways, the most usual method being by jointure.

Jointure, which was in lieu of satisfaction of dower, is a competent livelihood of freehold for the wife of lands and tenements, to take effect, in profit or possession, presently after the death of the husband, for the life of the wife at least.

If the jointure was made *after* marriage, she had her election after her husband's death to accept or reject it, and betake herself to her dower at common law, for she was not capable of consenting to it during coverture.

ESTATES LESS THAN FREEHOLD are: *estates for years, estates at will, and estates by sufferance.*

An estate for years is a contract for the possession of lands or tenements for some *determinate* period. Every estate which must expire at a *period certain* is an estate for years.

Where a man seized of lands and tenements letteth them to another for a certain period of time, which gives the tenant or lessee a right of entry on the lands only, which right

is called his *interest in the term*, and he is possessed not properly of the land, but of the *term of years*—the possession or seizin of the land remaining in him who hath the freehold.

It is called a term because its duration is bounded, limited, and determined.

The legal difference between *the term* and *the time* of a lease, for years, is that the word *term* does not merely signify the *time* specified in the lease, but the *estate* also, and *interest* that passes by that lease; therefore, the *term* may expire during the continuance of the time, as by surrender, forfeiture, and the like.

Where an estate for years is determined by any uncertain or unforeseen contingency, as by an act of God, the tenant or his executors shall have the *emblems*, as in case of tenant for life, but not if determined by his own act.

An estate at will is where lands and tenements are let by one man to another, to hold at the will of both parties, and the lessee enters thereon.

Under this estate the tenant shall have the *emblems*, unless the estate be determined by his own act.

An estate at sufferance is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all.

ESTATES UPON CONDITION, whether freehold or otherwise, are such whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated.

Estates upon condition are divided into those upon condition *implied* and those upon condition *expressed*, the latter including estates held in *vadio*, gage, or pledge; estates by statute staple, or statute merchant; and estates held *à elegit*.

Estates upon condition implied, in law, are where the grant of an estate has a condition annexed to it inseparably from its essence and constitution, although the condition be expressed in words; as, if a grant of an office be made to a man generally, without adding other words, the law tacitly annexes thereto a secret *condition* that the grantee shall duly execute his office.

Estates upon condition expressed in the grant

Itself are estates granted in fee-simple or otherwise, with an express qualification or provision annexed, whereby the estate shall either commence, be enlarged, or defeated, upon the performance or breach of such qualification or condition.

Conditions expressed are either *precedent*, such as must happen or be performed *before* the estate can vest; or *subsequent*, such as by the failure or non-performance of which an estate, *already* vested, may be defeated.

A condition in law is one *impliedly* annexed by law to the grant.

A condition in deed is one *expressly* mentioned in the deed or contract between the parties, and the *object* of them is either to avoid or defeat an estate.

A condition in deed is either *general* or *special*; the former puts an *end* altogether to the tenancy *on entry* for the breach of the condition; the latter only authorizes the reversioner to enter on the land and take the profits, and *hold the land by way of pledge* until the condition be performed.

Persons who have an estate of freehold subject to a *condition* are *seized*, and may *convey* or *devise the same*, though the estate will continue defeasible, or subject to the condition, till the condition be performed, destroyed, or released.

A limitation in law is where an estate is so expressly confined and limited by the words of its creation that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail.

The material distinction between a condition in a deed and a limitation in law consists in this: that a *condition* (in deed) does not defeat the estate, although it be broken, the law permitting it to endure unless the grantor, or his heirs or assigns, *enter* and take advantage of the breach of the condition; but it is the nature of a *limitation* (in law) to determine the estate when the period of limitation arrives, *without entry* or claim, no act being requisite to vest the right in him who has the next expectant estate.

It is a rule of law that he who enters for a condition broken becomes seized of his first estate, and he avoids all intermediate charges and encumbrances.

An estate *for years* ceases as soon as the condition is

broken, but an estate *of freehold* does not cease after condition is broken *until entry* or claim.

Words of limitation mark the *period* which is to determine the estate; **words of condition** render the estate *liable* to be defeated.

The one specifies the *utmost* time of continuance, and the other marks some event, which, *if* it takes place in the course of that time, will defeat the estate.

A conditional limitation is where a *condition subsequent* is followed by a limitation over to a third person in case the condition be not fulfilled, or there be a breach of it.

A collateral limitation gives an interest for a specified period, but makes the right of enjoyment to depend on some collateral event; as, where an estate is limited to a man and his heirs, tenants of the manor of Dale.

Estates in *gage*, *vadio*, or *pledge*, are estates granted as a security for money lent, and are of two kinds: *vivum vadium*, or living pledge; and *mortuum vadium*, or dead pledge, or *mortgage*.

Vivum vadium, or living pledge, is where a man borrows money of another, and grants him an estate at so much per annum, to hold till the rents and profits shall repay the sum borrowed. This is upon condition, to be void on repayment of the loan, and the land or pledge is said to be *living*, as it subsists and survives the debt, and on discharge of the same the land results back to the borrower.

Mortuum vadium, dead pledge, or mortgage, is where a man borrows money of another and grants him an estate in fee on condition that if he, the mortgagor, shall repay the mortgagee the sum borrowed, on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; but in case of non-payment at the time limited, the land put in pledge is, by law, forever dead and gone from the mortgagor, and the mortgagee's title is absolute.

Equity of redemption was a reasonable time or advantage allowed to mortgagors by courts of equity to redeem their lands.

Foreclosure was where the mortgagee either compelled the sale of the estate, in order to get the whole of his money immediately, or called upon the mortgagor to redeem his

estate presently, or, in default thereof, to be forever *foreclosed* from redeeming the same—that is, lose his equity of redemption.

Estates by statute merchant and statute staple are very nearly related to *vivum vadium*, being also estates conveyed to creditors, in pursuance of certain statutes, till their profits shall discharge the debt.

Both are securities for money; the one entered into before the chief magistrate of some trading town, pursuant to the statute 13, Edward I., *de mercatoribus*, and thence called *statute merchant*; the other, pursuant to statute 27, Edward III., before the mayor of the staple, whence called *statute staple*.

Estates by elegit are another kind of conditional estates, created by operation of law, for the security and satisfaction of debts.

Elegit (he has chosen) is the name of a writ founded on the statute Westminster Second, by which, after a plaintiff has recovered judgment for his *debt*, at law, the sheriff gives him possession of one-half of the defendant's lands and tenements, to be occupied and enjoyed until his debt and damages are fully paid, and during the time he so holds them he is called *tenant by elegit*.

TIME OF THEIR ENJOYMENT.—Estates are either in *possession* or *expectancy*, the latter being created at the same time, and are parcel of the same estates as those upon which they are expectant.

Estates in possession, or executed, are those whereby a present interest passes; and, not being dependent on any subsequent circumstances, there is but little to be said of them, all hitherto considered being estates of this kind.

Estates in expectancy, or executory, are such as are to be enjoyed in the *future*, and depend on some subsequent circumstance or contingency.

They are of two kinds: *remainder*, created by *act of parties*; and *reversion*, created by *act or operation of law*.

An estate in remainder is an estate limited to take effect and be enjoyed *after* another estate is determined; as, where lands are granted to A for twenty years, *remainder* to B in fee.

Both these *interests* are but different *parts of one whole* estate or inheritance; they are both created, and may subsist *together*—the one in possession, the other in expectancy; hence no remainder can be limited after the grant of an estate in fee-simple, because the tenant in *fee* hath in him the *whole* of the estate.

The three rules of law to be observed in the creation of remainders are: *first*, there must necessarily be some particular estate *precedent* to the estate in remainder; *secondly*, the remainder must commence or pass out of the grantor at the time of the creation of the particular estate; *thirdly*, the remainder must vest in the grantee during the continuance of the particular estate, or *eo instante* that it determines.

The precedent estate spoken of in the first rule is called the *particular* estate, being only a small *part* or *particula* of the inheritance or fee.

The use or necessity of the precedent particular estate was to prevent an abeyance of the freehold, as at common law an estate of freehold could not be created to commence *in futuro*; and for that the *remainder*, as its name implies, was but a *part* only of the thing disposed of.

It was a rule of the common law that an estate of freehold could not be created to commence *in futuro*, but that it ought to take effect *presently* (immediately), either in *possession* or *remainder*, because at **common law no freehold in lands could pass without livery of seizin**, which must operate *immediately* or not at all.

In granting, then, an estate of freehold to be enjoyed *in futuro*, it is necessary to create a previous or precedent particular estate, to subsist *till that period*, and for the grantor to deliver *immediate* possession of the land to the tenant of this particular estate, which is *construed* to be giving possession *to him in remainder*, since his estate and that of the particular tenant are *one* and the same estate *in law*.

The whole estate passes at once from the grantor to the grantees, the remainder man being seized of his remainder at the same time that the tenant is seized of his term.

While the enjoyment of the remainder is deferred, it is to all intents and purposes an estate commencing *in præsentî*, though occupied and enjoyed *in futuro*.

The particular estate is said to *support* the remainder; hence it is generally true that if the particular estate is void in its creation, or by any means defeated afterwards, the remainder supported by it is defeated also.

Remainders are of two kinds: *vested* or *contingent*.

Vested remainders are where the estate is fixed to remain to a *determinate person* after the particular estate is spent.

An estate is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment. It gives a legal or equitable seizin.

It is the present *capacity* of taking effect in possession, if the possession were to become vacant, that distinguishes a vested from a contingent remainder.

Contingent remainders are such where the estate in remainder is limited to take effect, either to a *dubious or uncertain person*, or upon a dubious or *uncertain event*.

Contingent remainders, if they amount to a freehold, cannot be limited on an estate for *years*, or on any particular estate *less* than a freehold.

It is not the uncertainty of enjoyment in the future, but the uncertainty of the *right* to that enjoyment, which marks the difference between a vested and contingent interest.

There must be a particular estate to precede a remainder, for it necessarily implies that a part of the estate has been already carved out of it, and vested in immediate possession in some other person.

The reason of the rule requiring a contingent remainder to be supported by a freehold was that the freehold should not be in abeyance, and that there should be always a visible tenant of the freehold, who might be made tenant to the *præcipe*, and answer for the services required.

If the particular estate terminates before the remainder can vest, the remainder is gone forever, for a freehold cannot, according to the common law, commence *in futuro*.

If the particular estate determines, or be destroyed, before the contingency happens upon which the expectant estate

depended, and leaves no right of entry, the remainder is annihilated.

The rule in Shelley's case declares that when the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, in fee or in tail, "*his heirs*" are words of *limitation* of the estate, and not words of purchase.

The rule is of positive institution, and in direct variance with rules of construction, for, while the latter seek to promote the *intention* of the parties, the former subverts it.

The origin of the rule in Shelley's case is attributed to the aversion the common law had to the inheritance being in *abeyance*, and the desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner by vesting the inheritance in the ancestor, thereby giving him the power of disposition over it.

The policy of the rule was that no person should be permitted to raise in another an estate which was essentially an estate of *inheritance*, and at the same time make the heirs of that person *purchasers*.

In order that the *heirs* of the ancestor might, in time, enjoy the estate, as well as the ancestor himself while living, it was necessary and usual, in order to prevent him from encumbering or alienating the estate, to grant him a particular estate *for life*, and the remainder to his *heirs*. By the *fixed rule* of construction or legal interpretation, which always sought for the *intention* of the parties to written instruments, the ancestor would have only the *use* and enjoyment of the estate *for life*, and *then* it would go to his heirs, who would take it, not from the ancestor by inheritance, but as an original and independent estate from the grantor, *by purchase*, for any estate not acquired by inheritance is said to be acquired by purchase.

But by a *fiction* in law—making the word *heirs*, or *heirs of his body*, in the transfer of estates, create a fee-simple or a fee-tail—the rule in Shelley's case declares, in substance, that the words "*his heirs*," in the grant, *merge* the life estate and the remainder, and cast the fee-simple, or whatever the estate may be, upon the ancestor, thus making him the

absolute owner of the whole estate. He could then partially or totally defeat the expectations of his relatives and the will of the grantor.

Hence we see that when a freehold is granted to a man, and remainder to *his heirs*, it is equivalent to giving him a fee-simple, or the entire estate.

Coke says that “**where the ancestors a freehold take, the words ‘his heirs’ a limitation make.**”

An **executory devise** is such a disposition of lands by will that thereby no estate vests at the death of the deviser, but only on some future contingency.

An *executory devise* differs from a *remainder* in three very material points, viz.: *first*, it needs not any particular estate to support it; *secondly*, by it a fee-simple, or other less estate, may be limited after a fee-simple; and, *thirdly*, by this means a remainder may be limited of a chattel interest after a particular estate for life created in the same.

An executory devise is, in effect, a contingent remainder, without any precedent particular estate to support it—a *freehold*, commencing *in futuro*—and such a grant or limitation would be void in a *deed*, but is good in a will by way of *executory devise*.

An executory devise is a limitation by will of a future contingent interest in lands, *contrary* to the rules of limitations of contingent estates in conveyance.

The reason of the institution of executory devises was to support the *will* of the testator, for when the testator intended to create a contingent remainder, and it could not operate as such by the rules of law, the limitation was then, out of indulgence to wills, held to be good as an executory devise.

As by executory devise a freehold interest could pass without livery or seizin—that is, commence *in futuro*—it needed no particular estate to support it, the only use of which is to make **the remainder, by its unity with the particular estate, a present interest.**

As stated, by executory devise a fee, or other less estate, may be limited after a fee; as, if a man devise lands to A and his heirs, but if he dies before the age of twenty-one, then to B and his heirs this remainder, though void in a deed, is good by way of executory devise.

There are two kinds of executory devises relating to real estate: *first*, where the devisor parts with his whole estate, but upon some contingency qualifies the disposition of it, and limits an estate upon that contingency; *secondly*, where the testator gives a future interest to arise upon a contingency, but does not part with the fee in the meantime.

Until the contingency happens, the fee passes, in the usual course of descent, to the heirs at law.

The utmost length of **time allowed for the contingency of an executory devise to happen** is in that of a life or lives in being, and twenty-one years thereafter, for the law so abhors perpetuities that it will not allow even wills to create them.

A valid executory devise cannot exist under an absolute power of disposition in the first taker.

Executory devises *differ* from contingent remainders in that the latter relate only to lands; executory devises relate to *personal*, as well as real, estate. Contingent remainders require a freehold to precede and support them; an executory devise does not. Contingent remainders must vest, at furthest, at the instant the preceding estate determines; but an executory devise may vest after the determination of a precedent estate. A contingent remainder may be barred and destroyed by different means; but an executory devise cannot be so prevented or destroyed by any alteration whatsoever in the estate out of which, or after which, it is limited.

A reversion is the residue of an estate left in the grantor, to commence in possession, *after* the determination of some particular estate granted out by him.

Coke says that **it is the returning of the land to the grantor or his heirs after the grant is over.**

The fee-simple of the land must abide somewhere, and if he who has before possessed of the whole carves out of it any less estate and grants it away, whatsoever is not granted remains in him.

Hence a reversion is never created by deed or writing, but always arises from *construction of law*.

The doctrine of merger is that whenever a greater estate and a less coincide and meet in one and the same person, in one and the same right, without any intermediate

estate, the less estate is immediately annihilated, or is said, in law phrase, to be *merged* or drowned in the greater.

An estate-tail is an exception to this rule, for a man may have in his own right an estate-tail and a reversion in fee, and they will not merge, being preserved from merger by operation of the statute *de donis*.

NUMBER AND CONNECTIONS OF THE TENANTS.—Estates may be held in *severalty*, in *joint-tenancy*, in *coparcenary*, and in *common*.

An estate in **severalty** is where one holds lands in his own right only, without any other person being joined or connected with him in point of interest during his estate therein.

An estate in **joint-tenancy** is where lands or tenements are granted to *two or more persons*, to hold in any manner, in which case the law construes them to be joint-tenants, unless the words of the grant expressly exclude such construction.

The creation of an estate in joint-tenancy depends on the wording of the deed or devise by which the tenants claim title, for this estate can only arise by purchase or grant—that is, *by act of the parties*—and never by the mere act of law.

Joint-tenants, therefore, are persons who own lands by a joint title, created expressly by one and the same deed or will. They hold uniformly by purchase.

The properties of an estate in joint-tenancy are derived from its *unity*, which is fourfold, viz.: unity of interest, unity of title, unity of time, and unity of possession. In other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. They are said to be seized *per my et per tout*—by the half or moiety, and of all; that is, they each of them have the entire possession, as well of every parcel as of the whole; therefore, **upon the decease of one joint-tenant the entire tenancy remains to the survivors**, and, eventually, to the last survivor. This is the nature and consequence of *unity* and *entirety* of their interest, and is called the doctrine of survivorship, or *jus accrescendi*.

This estate may be dissolved by destroying any one of its constituent unities.

An estate in coparcenary is where an estate of inheritance descends from the ancestor to two or more persons.

They are called parceners for brevity and because they may be constrained to make partition.

It arose at *common law*, where a person died and his next heirs were two or more females, as daughters, sisters, aunts, cousins, or their representatives; and by *particular custom*, as where lands descend, as in gavel-kind, to *all* the males in equal degree, as sons, brothers, and uncles. In either case these *co-heirs* were called *parceners*; they *all* inherit, and together make but *one* heir, and have but one estate among them.

Estates in coparcenary are in some respects like those in joint-tenancy, having the same *unities of interest, title, and possession*, but *differ* in that they always claim *by descent*, whereas joint-tenants always claim *by purchase*. Though having a *unity*, they have not an *entirety*, of interest—they are seized *per my* and not *per tout*; hence there is no survivorship among them.

The law of Hotchpot—"the word *seemeth* in English to mean a *pudding*, in which are put not one thing alone, but one thing with other things together"—was a metaphor used by our ancestors, denoting that the lands given in frank marriage and those descending in fee-simple should be mixed and blended together, and then divided equally among the daughters, *if* the donee in frank-marriage so wished.

An estate in coparcenary may be dissolved by destroying any of its three constituent unities; as, by partition, which disunites the possession; by alienation of one parcener, which disunites the title, and may disunite the interest; or by the whole at last descending and vesting in one person, which brings it to an estate in severalty.

An estate in common is where two or more persons hold lands, possibly by distinct titles and for distinct interests, but by unity of possession, because none knoweth his own severalty.

Tenants in common hold, therefore, by *unity of*

possession (without survivorship, being seized *per my* and not *per tout*), but have no unity of title, time, or interest.

Tenancy in common may be created by the destruction of the constituent unities of the two former estates, or by special limitation in a deed.

They may take by purchase or descent, and are deemed to have several and *distinct freeholds*.

They are also compellable to make partition of their lands and to account for profits arising from the same.

Tenancies in common differ in nothing from sole estates but merely the blending and unity of possession.

TITLE TO THINGS REAL, IN GENERAL.—A **title** is the means whereby a **man** has the just possession of his property.

The stages or degrees requisite to form a *complete title* are: *naked possession*, *right of possession*, and *right of property*, which, when united, form a complete or *legal title*.

Title to things real, or estates in lands and tenements, are acquired or lost *by descent*, where the title is vested in a man by the single operation of the law; or *by purchase*, where the title is vested in him *by his own act* or agreement.

Title by descent, or *hereditary succession*, is where a man, on the death of his ancestor, acquires his estate by right of representation, as his heir at law.

An ancestor is one that an inheritance of lands or tenements can be derived from only by his having had *actual seizin* of such lands, either by his own entry, or by the possession of his own or the ancestor's lessee for years; or by receiving rent from a lessee of the freehold; and, in incorporeal hereditaments, by his having what is equivalent to corporeal seizin.

An heir is he upon whom the law casts the estate immediately on the death of the ancestor.

Right heirs mean direct or lineal heirs.

Heir apparent is one whose right of inheritance is indefeasible if he outlive the ancestor.

Heir presumptive is one who, if the ancestor should die immediately, would, in the present circumstances of things, be the heir, but whose right of inheritance may be defeated by the contingency of some nearer heir being born.

THE RECKONING

OF DEGREES OF

KINDRED OR RELATIONSHIP

IS AS FOLLOWS:

I.—LINEAL.

CONSANGUINITY.	<i>Ascending.</i>	1. Father, mother. 2. Grandfather, grand-mother. 3. Great grandfather, great grandmother, and so on ad infinitum.
	<i>Descending.</i>	1. Father, mother. 2. Son, daughter. 3. Grandson, granddaughter, and so on ad infinitum.
AFFINITY.	<i>Ascending.</i>	1. Father-in-law, mother-in-law. 2. Step-father, step-mother
	<i>Descending.</i>	1. Father-in-law, mother-in-law. 2. Son-in-law, daughter-in-law.

II.—COLLATERAL.

CONSANGUINITY.	1. Brother, sister. 2. Brother's children, sister's children. 3. Uncle, aunt.
AFFINITY.	1. Brother's wife, sister's husband. 2. Uncle's wife, aunt's husband.

An inheritance is the estate descending from the ancestor to the heir.

Affinity is relationship by marriage.

Consanguinity, or *kindred*, is the connection or relation of persons descended from the same stock or common ancestor. It is either *lineal* or *collateral*.

Lineal consanguinity is where one kinsman is descended, in a *direct* line, from the other.

Collateral Consanguinity is where the kinsmen descend from the same stock or common ancestor, but *not* in a *direct* line one from the other.

Degrees of relationship are computed by beginning at the common ancestor and reckoning *downwards*, and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor—that is, the *degree* in which they are related to each other.

The rules of descent by the laws of England are as follows:

Inheritances shall lineally *descend* to the issue of the person last actually seized, *in infinitum*, but shall never lineally ascend.

The male issue shall be admitted before the female.

Where two or more males are in equal degree, the eldest only shall inherit, but the females all together.

The lineal descendants, *in infinitum*, shall represent their deceased ancestor—that is, shall stand in the same place as he himself would had he lived.

On failure of lineal descendants, the inheritance shall descend to the collateral relations of the blood of the first purchaser, subject to the three preceding rules, to evidence which blood there are two rules, *viz.*:

The collateral heir of the person last seized must be his next collateral kinsman of the whole blood.

In collateral inheritances, the male ancestral stock shall be preferred to the female, unless the lands have descended from a female.

TITLE BY PURCHASE, or *perquisition*, is the possession of lands which a man hath by his own act or agreement, and not by the mere act of law, or by descent. It includes every other method of coming to

an estate but that by inheritance. This embraces title by escheat, by occupancy, prescription, forfeiture, and alienation.

Title by escheat (signifying *chance* or accident) denotes an obstruction of the course of descent, and a consequent determination of the tenure by some unforeseen contingency, in which case the land naturally resulted back by a kind of reversion to the original grantor, or lord of the fee.

Escheat resulted from either natural or civil causes, as by the death of the tenant without heirs, or by his blood becoming attainted, etc.

The law of escheat is founded upon the principle that the blood of the person last seized in fee-simple is by some means utterly extinct or gone.

Title by occupancy is the taking possession of those things which before belonged to nobody.

This title was founded upon the rule of the ancient common law, that what belonged to nobody is given to the occupant by natural right.

The law of alluvion and dereliction—that is, where land was *made* by the *washing up* of earth and sand by the sea, rivers, etc., and by the sea *shrinking back* below the usual water mark—was, that if an island arose in the middle of a river, it belonged in common to the owners of the lands on each side of it; but if nearer to one bank than the other, it belonged to the proprietor of the nearest shore.

It was probably taken from the *civil law*.

But if the *alluvion* or *dereliction* was sudden and considerable, it belonged to the King at common law, and by the civil law to the first occupant.

Jetsam is where goods are cast into the sea, and there sink and remain under water.

Ligan is where they are sunk in the sea, but tied to a cork or buoy, in order to be found again.

Flotsam is where they continue swimming on the surface of the water.

Title by prescription is where a man can show no other title to what he claims than that he and those under whom he claims have *immemorially* used to enjoy it.

All prescription must be in a man and his ancestors, or in

a man and those whose estate he hath, which last is called prescribing in a *que estate*.

Usage is *long* and *uniform practice*.

Custom is *local* usage that has acquired the *force* of law.

Prescription is immemorial *personal* usage—that is, usage beyond the “time of memory.”

The principal distinction between custom and prescription is, that one is *local*, and the other a *personal*, usage.

Estates gained by prescription are not, of course, descendible to the heirs general, like other purchased estates, but are an exception to the rule; for, properly speaking, the prescription is rather to be considered as an evidence of a former acquisition than as an acquisition *de novo*.

Nothing but incorporeal hereditaments can be claimed by prescription, as a right of way, a common, etc.

No prescription can give a title to lands and other corporeal substances of which more certain evidence may be had.

A prescription must always be laid in him that is tenant of the fee.

A tenant for life, for years, at will, or a copyholder, cannot prescribe, by reason of the imbecility of their estates.

A prescription cannot be for a thing which cannot be raised by grant, for the law allows prescription only in support of the loss of a grant which it presupposes to have existed.

If a man prescribes in a *que estate*, nothing is claimable but such things as are *incident*, *appendant*, or *appurtenant*, to lands.

Incident means depending upon, appertaining, or naturally relating or belonging to.

Appendant is where a right, or thing, is inseparably—from the very nature of it—*incident* to a grant.

Appurtenant rights or things arise from no such absolute or necessary connection, but only *may* be annexed or attached.

Title by forfeiture arises where a punishment is annexed by law to some illegal act, or negligence, in the owner of things *real*, as lands and tenements, whereby he loses all his interest therein, his estate being transferred to

another, generally the injured party, who thus acquires the title to the same.

Forfeitures were occasioned by crimes, by alienation contrary to law, as in *mortmain*; by lapse, by simony, by non-performance of conditions annexed to estates, by waste, by breach of copyhold customs, and by bankruptcy.

Alienation in mortmain, or in *mortua manu*, was an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. This the statute *de religiosis*, 7 Edward I., prohibited, and, to avoid the statute, the religious houses invented common recoveries.

Disclaimer is where a tenant disclaims to hold of his lord. This was a *civil crime*, and one of the crimes which occasioned forfeitures of lands upon reasons most apparently feudal.

Lapse is a forfeiture of the right of presentation to a vacant church by neglect of the patron to present within the time prescribed.

Simony is the corrupt presentation of any one to an ecclesiastical benefice, as for money, gift, or reward, whereby that turn becomes forfeited.

Waste is a spoil, or destruction, in any corporeal hereditaments, to the prejudice of him that hath the inheritance. Whatever does *lasting* damage to the freehold is *waste*.

It is either *voluntary*, which is a crime of *commission*, as pulling down a house; or it is *permissive*, which is a matter of *omission* only, as by suffering it to fall from want of repairs.

A bankrupt is a trader who secretes himself, or does certain other acts tending to defraud his creditors.

By *bankruptcy*, or the act of becoming a bankrupt, the title of all the estates of the bankrupt is transferred to the assignees of his commissioners, to be sold for the benefit of his creditors.

Title by alienation, conveyance, or purchase, comprises in its more limited sense any method whereby estates are transferred, or voluntarily resigned, by one man and accepted by another, whether by sale, gift, marriage-settlement, devise, or other transmission of property, by the mutual consent of the parties.

Originally this could not be done without the mutual consent of both lord and vassal.

All persons are *prima facie* capable of conveying and purchasing, unless the law has laid them under particular disabilities.

Conveyances and purchases by idiots, persons of non-sane memory, infants, and persons under duress, are *voidable*, but not actually void.

Common assurances of the kingdom, as they were called, are the legal evidences of alienation or transfer of property, whereby every man's estate is *assured* to him, and all controversies, doubts, and difficulties are either prevented or removed.

Alienation by common assurances are four kinds, viz.:

By deed, or matter *in pais*, which is an assurance transacted between two or more private persons *in pais* (in the country)—that is, according to the old common law, upon the *very spot*.

By matter of record, which is an assurance transacted only in public courts of record.

By special custom, obtaining in some particular places, relating to some particular species of property only.

By devise, as contained in the last will and testament of a decedent.

Alienation by deed, or *assurances by deed*, may be considered with reference to their general nature and their several species.

As to their general nature, they are regarded as the *solemn act* of the parties.

A deed is a writing, sealed and delivered by the parties. It may be a deed indented, or *indenture*, or a deed-*poll*.

An indenture is now only a *name* given to a species of deeds, though formerly, when deeds were more concise than at present, it was usual to write both parts of the deed (as they originally consisted of two parts or instruments) on the same piece of parchment, with some words or letters of the alphabet written between them, through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half the words on one part and half on the other, but at length indenting only came into use.

A deed-poll is a plain deed, made by one party only, not indented, but polled or shaved quite even, and therefore called a deed-poll or single deed.

The requisites of a deed are as follows:

Sufficient parties—that is, parties competent to contract—and proper subject-matter.

A good and sufficient consideration.

Must be written or printed, on parchment or paper.

Legal and orderly parts, properly set forth.

Reading it, if desired.

Sealing and signing it.

Delivery, by the party himself or his attorney; and

Attestation, or execution in the presence of witnesses.

The legal, or formal and orderly, parts of a deed—that is, the words sufficient to specify the agreement and bind the parties—are: the premises, the *habendum*, the *tenendum*, the *reddendum*, the conditions, the warranty, the covenants, and the conclusion.

The premises in a deed are used to set forth the number and names of the parties, with their additions or titles.

The habendum expresses what estate or interest is granted by the deed.

The tenendum—"and to hold"—is now of but little use, and only kept in by custom.

The reddendum is a reservation, whereby the grantor doth create or reserve some new thing to himself out of what he had before granted, as rent, or the like.

The conditions are clauses of contingency, on the happening of which the estate granted may be defeated.

The warranty is that clause or part whereby the grantor doth, for himself and his heirs, warrant and secure to the grantee the estate so granted.

Warranties are *implied* or *expressed*, and *lineal* or *collateral*.

An implied warranty is such as the law presumes or concludes every grantor or vendor to make in disposing of property; as, for instance, that he has the right to make such disposition.

An express warranty in the transfer of lands and tenements is an *express clause* binding the grantor and his heirs; it is a kind of covenant real. These express war

ranties were introduced to evade the strictness of the feudal doctrine of non-alienation without the consent of the heir.

Lineal warranty was where the heir derived, or might by possibility have derived, his title to the land warranted either from or through the ancestor who made the warranty.

Collateral warranty was where the heir's title to the land neither was, nor could have been, derived from the warranting ancestor.

The covenants are clauses of agreement contained in the deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform or give something to the other.

A covenant real is where the covenanter covenants for himself and his *heirs*, upon whom it descends, and who are bound to perform it, provided they have assets by descent.

The conclusion of a deed mentions the execution and date of it.

Considerations are divided into *good* and *valuable*.

A good consideration is such as that of blood, or natural love and affection, as where a man grants an estate to a near relative.

A valuable consideration is such as money, marriage, or the like.

A deed takes effect only from its delivery. A deed without date is good if the date when it was executed or delivered can be proved.

Attestation is necessary rather for preserving the evidence than for constituting the essence of the deed.

If a man covenants, not only for himself and his heirs, but also for his executors and administrators, his personal assets, as well as his real, are likewise pledged for the performance of the covenant, which makes *such* a covenant better than any warranty.

A deed may be avoided by the want of any of the above-mentioned requisites, or by subsequent matter, as erasure or alteration, defacing its seal, cancelling it, disagreement of those whose consent is necessary, or by judgment of a court of justice.

An escrow is a deed delivered to a third party, to hold as a *scrowl* or writing, that is not to take effect as a deed until some conditions be performed by the grantee.

As to the different species of deeds, some serve to convey real property, and others only to *charge* or *discharge* it.

Deeds serving to alien or convey real estate are called *conveyances*, which conveyances are either by common law or by statute.

Of conveyances by common law, some are *original* or *primary*, and others are *derivative* or *secondary*; the former are those by means whereof the benefit or estate is created, or first arises; and the latter, those by which the benefit or estate, already created, is *enlarged*, restrained, transferred, or extinguished.

The original or primary conveyances are: feoffment, gift, grant, lease, exchange, and partition.

The derivative or secondary conveyances are: release, confirmation, surrender, assignment, and defeasance.

A feoffment is the transfer or gift of any corporeal hereditament to another, perfected by *livery of seizin*, or delivery of bodily possession to the feoffee, without which no freehold estate therein could be created at common law. Strictly speaking, it refers to the conveyance of an estate *in fee*. He that so gives, or enfeoffs, is called the *feoffor*, and the person enfeoffed is denominated the *feoffee*.

Livery of seizin is the *feudal investiture*, or delivery of corporeal possession, of the land or tenement. It was either *in deed* or *in law*.

Livery in deed was performed by the feoffor delivering to the feoffee (all other persons being out of the ground) a clod, twig, or some part of it—as a ring, or latch, if a house—with the words, “I deliver these to you in the name of seizin of all the lands and tenements contained in this deed.”

Livery in law is where the same is not made *on* the land, but *in sight* of it only, the feoffor saying to the feoffee, “I give you yonder land; enter and take possession.”

A gift—donatio—differs in nothing from a feoffment but in the nature of the estate passing by it, being properly applied to the creation or conveyance of an estate-tail, as feoffment is to that of an estate in fee.

A grant—concession—is the regular method, by the common law, of conveying incorporeal hereditaments, or

Release may mean - by enlarging an estate, enlarging estate - passing the estate under estate - passing a right, under right - extinguishment - entry and possession.

such things whereof no livery can be had. It is now used also in the transfer of real estate, the words "grant, bargain, and sell" being express covenants for title.

A lease is properly a conveyance, in consideration of rent or other recompense, of lands and tenements, for life, for years, or at will, but always for a less time than the lessor hath in the premises; for, if it be for the whole interest, it is more properly an *assignment* than a lease.

An exchange is the mutual conveyance of equal interests, the one in consideration of the other.

A partition is the division of an estate held in joint-tenancy, in coparcenary, or in common, between the respective tenants, each taking his distinct part to hold in severalty.

A release is the discharge or conveyance of a man's right in lands or tenements to another that hath some former estate in possession therein. It is the descending of a greater estate upon a less.

A confirmation is the conveyance of an estate or right *in esse*, whereby a voidable estate is made sure, or a particular estate is increased, and the words of it are, "have given, granted, ratified, approved, and confirmed." It is of a nature nearly allied to a release.

A surrender is the yielding up of an estate for life or years to him that hath the immediate remainder or reversion wherein the particular estate *surrendered* may merge.

It is of a nature directly opposite to a *release*; for, as that operates by the greater estate descending upon the less, a surrender is the falling of a less estate into a greater. The words used are, "have surrendered, granted, and yielded up."

An assignment is the transfer, or making over to another, of the whole right one has in any estate; it is usually in a lease, for life or years.

A defeasance is a collateral deed, made at the same time with the original conveyance, containing certain conditions, upon the performance of which the estate created may be defeated or undone.

Conveyances by statute depend much on the doctrine of *uses* and *trusts*, which, in their nature and origin,

It is necessary that every man should be understood by common law to have some estate in land, and that it should be understood by common law that every man should be understood by common law to have some estate in land, and that it should be understood by common law that every man should be understood by common law to have some estate in land.

are the same, the old doctrine of *uses* being revived under the denomination of *trusts*.

A use or trust was a confidence reposed in another, who was *terre-tenant*, or tenant of the land, that he would dispose of the land according to the wishes of the *cestuy que use*, or *cestuy que trust*, to whose *use* it was granted, and suffer him to take the profits.

Uses and trusts originated in ecclesiastical ingenuity, the notion being transplanted from the civil law into England by the ecclesiastics, near the close of the reign of Edward III. (about 1370), to evade the statutes of *mortmain*, by obtaining grants of lands, not to religious houses *directly*, but to their *use*; thus distinguishing between the *possession* and the *use*.

Uses are not always to be executed at the time the conveyance is made; hence we have what are called *future uses*, which are as follows:

Shifting or secondary uses take effect in derogation of some other estate, and are either limited by the deed creating them, or authorized to be created by some person named in it.

Thus: If an estate be limited to A and his heirs, with a proviso that if B pay to A one hundred dollars by a given time, the use of A shall cease, and the estate go to B in fee, the estate is vested in A, subject to a shifting or secondary use in fee in B.

Springing uses are limited to arise on a future event, where no preceding estate is limited, and they do not take effect in derogation of any preceding interest; as, if a grant be to A in fee, to the use of B in fee after the first day of January next.

Future or contingent uses are limited to take effect as remainders; as, if lands be granted to A in fee, to the use of B on his return from Rome. This is a future contingent use, because it is uncertain whether B will ever return.

Resulting uses are where the use limited by deed expires, or cannot vest, or was not to vest but upon a contingency, which has not happened, the use *results* back to the grantor.

There are also resulting trusts *implied* by law from the manifest intention of the parties and the nature and justice of the case; as, where an estate is purchased in the name of A and the price is actually paid at the time by B; here is a resulting trust implied by law in favor of B.

Contingent uses are subject to the same rules as contingent remainders.

Springing or contingent uses *differ* from an *executory devise* in that there must be a person seized to such uses at the time when the contingency happens, else they can never be executed by the statutes; and, therefore, if the estate of the feoffee to such use be destroyed, by alienation or otherwise, before the contingency arises, the use is destroyed forever, whereas by an executory devise the freehold itself is transferred to the future devisee.

The statute of uses having transferred all uses into actual possession, or, rather, having drawn the possession to the use, gave birth to other species of conveyances, viz.: a covenant to stand seized to uses; a bargain and sale of lands enrolled; a conveyance by lease and release; deeds to lead or declare uses — that is, the use of other more direct conveyances; deeds to revocation of uses.

A covenant to stand seized to uses is that by which a man covenants that, in consideration of blood or marriage, he will stand seized of lands to the use of another; as, to the use of his child, wife, or kinsman.

On executing the covenant the other party becomes seized of the use of the land, and the statute of uses immediately operates by annexing the possession to the use, or, as it is called, “executes” at once the use or estate.

Deeds of revocation of uses were the execution of a *power reserved* at the creation of the use of recalling at a future time the use or estate so created.

These last species of conveyances owe their operation principally to the statute of uses.

In time *trusts* superseded, or were made to answer, in general, all the beneficial ends or purposes of *uses*, without their inconveniences or frauds.

A trust, in the general and enlarged sense, is a *right* on the part of the *cestuy que trust* to receive the profits and dispose of the lands in equity.

They are two kinds: *executed*, when either the legal or equitable title passes; or *executory*, when it is to be perfected at some future time, by conveyance or settlement.

No particular *form* is requisite to create a trust; it is sufficient if the terms of the trust can be duly ascertained by the writing.

The courts now consider a trust estate as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity, which the other is subject to in law.

Deeds which do not convey, but serve only to *charge* or *discharge* real property, are: obligations or bonds, recognizances, and defeasances.

A bond or obligation is a deed whereby a person, the obligor, obligates himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day appointed.

The *penal* sum, or penalty, attached to the bond for its breach or forfeiture is usually drawn for double the amount of the bond or money borrowed, in order to cover the principal, interest, expense, and damages sustained from non-performance of the covenants, which is all that is now recoverable upon forfeiture of a bond, no matter what the amount of the penal sum, or penalty, inserted. Formerly the whole penalty was recoverable at law.

A recognizance is an obligation of *record*, entered into before some court of record or magistrate duly authorized, with condition to do some particular act; as, to appear at court, to keep the peace, etc.

Another distinction between a recognizance and a bond is, that a *bond* is a creation of a fresh debt or obligation *de novo*, while a *recognizance* is the acknowledgment of a *former* debt upon record.

A defeasance upon a bond, recognizance, or judgment recovered, is a condition which, when performed, defeats or undoes it, and discharges the estate of the obligor.

Alienation by matter of record. — These assurances or conveyances are such as do not depend entirely on the act or consent of the parties themselves, but are when the sanction of some court of record is called in to substantiate and witness the transfer of real property. They are:

private acts of Parliament, the King's grants, fines, and common recoveries.

Private acts of Parliament, as a *species of assurances*, are such as, by the transcendent authority of Parliament, are calculated to give such reasonable powers of relief as are beyond the reach of the courts or ordinary course of law.

A fine of lands or tenements, also called an acknowledgment of a feoffment of record, is an amicable composition or agreement of a suit, either actual or fictitious, by leave of the King or his justices, whereby the estate or lands in question are acknowledged to be the right or property of one of the parties.

The force and effect of fines, when levied by such as have themselves any interest in the estate, are to assure the lands in question to the cognizee by barring the respective rights of parties, privies, and strangers.

Fines are of equal antiquity with the first rudiments of the law, instances having been produced of them even prior to the Norman invasion.

Their origin was founded on an actual suit commenced at law for the recovery of the possession of land or other hereditaments, and the possession gained by composition, which possession thus acquired was found to be so sure and effectual that fictitious actions were often commenced to obtain the same security.

A *fine* is so called because it puts an end, not only to the suit thus commenced, but also to all other kinds of suits and controversies concerning the same matter.

A common recovery was so far like a fine that it is a suit, either actual or fictitious, for lands, brought against the tenant of the freehold, who thereupon vouches another, who undertakes to defend the tenant's title, but, upon such vouchee's *making default*, the land is recovered by judgment at law against the tenant, who, in return, obtains judgment against the vouchee to recover lands of equal value in recompense. This supposed adjudication of the right binds all persons, and vests a free and absolute title, or fee-simple, in the recoveror.

They were invented by the ecclesiastics to elude the

For method of proceeding see Blackstone

statutes of *mortmain*, the religious houses setting up a fictitious title to the land which it was *intended* they should have, and brought an action to recover it against the tenant, who, by fraud and collusion, made no defence, and judgment being thereby given to the religious houses, they "*recovered*" the land, by sentence of law, upon a supposed prior title.

These *common recoveries*, thus originally invented by the ecclesiastics to elude the statutes of *mortmain*, were afterwards encouraged by the finesse of the courts of law of Edward IV., in order to put an end to all fettered inheritances, and bar not only estates-tail, but also remainders and reversions expectant thereon, which was the force and effect of a *recovery*, provided the tenant in tail suffers, or is vouched in, such recovery; for it was found that these *estates-tail* were of such great inconvenience, by tying up the landed property and creating perpetuities, that, in order to unfetter them, common recoveries were encouraged by the judges, and by their use all limitations upon *estates-tail* were removed, and an absolute and pure fee-simple passes as the legal effect.

These common recoveries are considered simply in the light of a *conveyance on record*, invented to give a tenant in tail an absolute power to dispose of his estate as freely as if he was tenant in fee-simple. It is the only mode of conveyance by which a tenant in tail can effectually dock the entail, for by *fine* he only *bars his issue*, and not subsequent remainders and reversions.

By statute, *fines* and *common recoveries* are swept away, both in England and in this country.

Alienation by special custom is confined to those conveyances or assurances by special custom that include the transfer of *copyhold* lands and such customary estates as are holden in ancient demesne, or manors of a similar nature.

This is effected by *surrender*, which is the giving up of the estate into the hands of the lord for the purposes expressed in the surrender.

Of assurance by surrender, the several parts are: *surrender* by the tenants into the hands of the lord, to the

use of another, according to the custom of the manor; *presentment* by the tenants, or homage, of such surrender; and *admittance* of the surrenderee by the lord, according to the uses expressed in such surrender.

Alienation by devise is the method contained in a man's last will and testament of disposing of lands and tenements.

It is also styled a *revocable* assurance, *posthumously* disposing of property or the custody of children.

Before the conquest, lands were devisable by will in England, but, upon the introduction of the military tenures, the restraint upon devising lands naturally took place as a breach of the feudal doctrine of non-alienation without the consent of the lord, and so it stood at common law until again authorized by the statute of wills, 34 Henry VIII., and subsequently made more universal by the statute of tenures, 29 Charles II.

A will is a disposition of real and personal property, to take effect after the death of the testator.

Will and *devise* are generally considered and used as synonymous; but when the will operates on personal property only it is called a *testament*, and when upon real estate only, a *devise*. Where the instrument disposes of *both* real and personal property it is usually denominated "the last will and testament."

Testaments of personal property or chattels operate upon whatever the testator dies possessed of, but *devises* only upon such real property or lands as were his at the time of executing and publishing his will.

Wills or devises must be in writing, signed by the testator, or some person in his presence by his direction, and be subscribed by two or more witnesses in his presence and in the presence of each other.

In construing wills or devises, and deeds or common assurances, the general rules and maxims, as laid down by the courts, are as follows:

That the construction be favorable, and as near the minds and apparent intentions of the parties as the rules of law will admit; therefore, the construction must be reasonable and agreeable to common understanding.

Statute of Wills and devises 29 Car. II. c. 3

2 That where the intention is clear, too minute a stress be not laid on the strict and precise signification of words.

3 That the construction be made upon the entire instrument, and not from disjointed parts of it.

4 Words bearing two senses to be taken in the sense *agreeable* to law.

5 Rejecting the *latter* of two totally repugnant clauses in a deed, and the *former* in a will.

6 *Deeds* to be taken most strongly against the maker, but *devises* to be most favorably expounded; to pursue, if possible, the will of the devisor, who, for want of advice or learning, may have omitted the legal or proper phrases.

In the construction or expounding of wills and devises, **the intention of the testator is admitted to be the pole-star by which the courts must steer**, yet that intention is liable to be very much controlled by the application of technical rules and the superior force of technical expressions.

THINGS PERSONAL, or chattels.—Under this name are included all sorts of things movable which may attend a man's person wherever he goes, which includes whatever wants the duration or the immobility attending things real. They also include something more, the whole being comprehended under the general name of *chattels*.

Things personal, or chattels, may be considered with reference to their *distribution*, the *property therein*, and the *title* to them.

AS TO THEIR DISTRIBUTION, chattels are **divided into** *chattels real* and *chattels personal*.

Chattels real are such as concern or savor of the realty, and are so styled as being interests issuing out of, or annexed to, *real estate*, and of which they have one quality, viz.: *immobility*, which denominates them real, but want a sufficient legal determinate *duration*, which constitutes them *chattels*, as a lease for a term of years, a mortgage, and the like.

Chattels personal are, properly and strictly speaking, *movables*, which may be annexed to, or attend on, the person of the owner wherever he goes.

Property in things personal, or chattels, is

*the indistinctness of property in possession
property in possession*

either in *possession*, as where a man has not only the right, but the actual enjoyment, of the thing; or in *action*, where a man has only a bare right, without occupation or enjoyment—called a *thing* or *chose in action*, being recoverable by action at law.

A thing or chose in action is defined to be a thing incorporeal, or a *right*, as an annuity, money due on a bond, etc.

Property in possession is *absolute* or *qualified*.

Absolute property is where a man has such an exclusive right in the thing that it cannot cease to be his without his own act or default.

Qualified property is such as is not in its nature permanent, but may sometimes subsist, and at other times not subsist, which latter may arise where the subject is incapable of absolute ownership, or from the peculiar circumstances of the owners.

Limitations of personal goods and chattels, in remainder, after a bequest for life, are allowed in last wills and testaments.

Things personal may belong to their owners, not only in severalty, but in joint-tenancy, and in common also, as well as real estates, but not in coparcenary, because they do not descend from the ancestor to the heir.

Stock used in a joint-undertaking, as by way of partnership in trade, is always considered as *common*, and not as *joint* property, and there shall be *no* survivorship therein.

Title to things personal may be *acquired* or *lost* by occupancy, prerogative, forfeiture, custom, succession, marriage, judgment, gift or grant, contract, bankruptcy, testament, and by administration.

Title by occupancy is that which still gives to the first occupant a *right* to those few things which have no legal owner, or are incapable of permanent ownership, such as *goods captured* from alien enemies, *things found*, the *benefit of the elements*, *animals wild* by nature, *emblems*, things gained by *accession*, things gained by *confusion*, *literary property*, *inventions*, etc.

The right of taking goods of alien enemies is

restrained to such captors as are authorized by the public authority of the State.

Movables found upon the earth or in the sea, unclaimed by any owner, are supposed to be abandoned by the last proprietor, and therefore belong, as originally in a state of nature, to the first occupant or fortunate finder.

The benefits of the elements—the light, the air, the water, etc.—thus, too, only can be appropriated.

Animals feræ naturæ, or wild by nature, all mankind has a right to pursue and take by the original grant of the Creator, which natural right still continues unless where restrained by law.

Emblements must be referred to this principle of occupancy also. They are subject to many, though not all, the incidents attending personal chattels. They are not the object of *larceny* before they are severed from the ground.

Accession, by natural or artificial means, as the *growth* of vegetables, the pregnancy of animals, embroidering of cloth, the conversion of wood or metal into utensils, etc., is a doctrine of property also grounded upon this principle.

Confusion of goods also—as where the goods of two persons are indistinguishably intermixed—the English and civil law essentially agreeing that, if the mixture be by mutual consent, the proprietors have each an interest in common in proportion to their respective shares. But where one wilfully intermixes his own with that of another, without his knowledge or approbation, the law, to guard against fraud, gives the entire property to him whose original domain is invaded.

A copyright, or patent, is a right or property which a person has in his own original composition or invention, and, being grounded on labor and inventive skill, is properly reducible to this head, *occupancy* itself being supposed to be founded on *personal* labor—ancient wells being the acknowledged property of the diggers of them, while the land thereabout was still in common.

The *identity* of a literary composition consists entirely of the sentiment and the language.

Title by prerogative is a method of acquiring property in personal chattels by the King's *prerogative*, whereby

Copy right 28 years. If another &c. or any of them when
where that work was originally composed &c. by him or than
our man, or his heirs, should a to 14 years more.
Patent 14 years. May be renewed 7 years more, at the discretion
of board of Commissioners.

a right may accrue; either to the Crown itself or to such as claim under the title of the Crown, as by the King's grant; or by prescription, which supposes an ancient grant.

Title by forfeiture is that whereby a title to goods and chattels may be acquired or lost as a punishment for some crime or misdemeanor, and a compensation for the offence and injury to the party injured—such as treason, felony, manslaughter, and *præmunire*.

Title by custom is that whereby a right vests in some particular persons, either by the local usage of some particular place, or by the almost general and universal usage of the kingdom, as heriots, mortuaries, and heir-looms.

Heriots are a customary tribute of goods and chattels, payable to the lord of the fee on the decease of the tenant or owner of the lands. It now consists of the best live beast the tenant dies possessed of, or sometimes the best inanimate good, as a jewel or piece of plate, but it is always a personal chattel.

Heriots are of Danish origin, and a relic of villein tenure. They are either *heriot service* or *heriot custom*.

Heriot service amounts to little more than a mere rent; it is due upon a special reservation in a grant or lease of lands.

Heriot custom depends merely upon immemorial usage and custom, and arises upon no special reservation whatsoever.

Mortuaries are a sort of *ecclesiastical* heriots, being a customary gift claimed by and due to the minister, in many parishes, on the death of his parishoners.

Heir-looms—*loom*, of Saxon origin, signifying a limb or member of the inheritance—are such goods and chattels as, contrary to the nature of chattels, shall go, by special custom, to the heir, along with the inheritance, and not to the executor of the last proprietor; as crown jewels, charters, deeds, court-rolls, chests containing them, monuments, tombstones, and coats-of-arms.

Heir-looms by special custom are sometimes carriages, utensils, and other household implements, but such custom must be *strictly* proved.

Heir-looms by general custom are whatever is strongly affixed to the freehold or inheritance, and cannot be severed from it without violence or damage.

Title by succession is that by which one set of men may, by succeeding another set, acquire a property in their goods and movables. In strictness of law, this applies to corporations aggregate and such corporations sole as are the heads and representatives of bodies aggregate; for, in judgment of law, a corporation never dies.

Title by marriage is where chattels and personal property belonged *formerly* to the wife, but which, on *marriage*, are, by act of law, vested absolutely in the husband, with the same degree of property and with the same powers as the wife, when sole, had over them, *provided* he reduces them to possession.

The paraphernalia of the wife, which consists of her apparel and ornaments, suitable to her rank and degree, she acquires a property in by marriage.

Title by judgment is where, in consequence of some suit at law, a man may in some cases not only *recover*, but originally *acquire*, a right to personal property; as, to *penalties*, recoverable by an action popular; *damages*, given to a man by a jury, as compensation and satisfaction for some injury sustained; and *costs* of suit.

Title by gift or grant is acquired in chattels by the voluntary conveyance of them to another, in writing or by word of mouth, the strongest evidence of which is the *delivery* of them into the possession of the person to whom given. A true or proper gift or grant is always accompanied with delivery of possession, and takes effect immediately.

Gifts are always gratuitous.

Grants are upon some consideration or equivalent.

Under the head of gifts or grants of chattels *real* may be included all leases of lands for years, assignments and surrenders of those leases, and all other methods of conveying an estate less than freehold.

Title by contract *usually* conveys an interest merely in action.

A contract is an agreement, upon sufficient consideration, to do or not to do a particular thing

When conveyed merely to personalty it is usually termed a Gift of Sale

Contracts may be either *express* or *implied*, and *executed* or *executory*.

Express contracts are where the terms of the agreement are openly uttered and avowed at the time of the making.

Implied contracts are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform.

Executed contracts are such in which the right and the possession are transferred *together*; they convey a *chose* in possession.

Executory contracts are such in which the *right only* is transferred; they convey a *chose* in action.

A nudum pactum, or *naked compact*, is an agreement to do or to pay anything on one side without any compensation or consideration. It is totally void in law.

The most usual species of personal contracts are: sale or exchange, bailment, hiring, borrowing, and debt.

Sale or exchange is a transmutation of property from one man to another in consideration of some price or recompense in value.

An exchange is where it is a commutation of goods for goods.

A sale is where it is a transfer of goods for money.

There is an *implied* warranty annexed to every sale that the seller sells them as his own, or has authority to sell them; and if the title proves defective, a purchaser of goods and chattels may have satisfaction from the seller.

BAILMENT—from the French *bailler*, to deliver—is a delivery of goods in trust upon a contract, express or implied, that the trust shall be faithfully performed by the bailee.

Bailments are divided into five sorts, viz.:

Depositum, or *deposit*, where the property bailed is to be kept by the bailee, for no particular purpose, without recompense. In this case the bailee must exercise *ordinary* care.

Mandatum, or *commission*, is where the bailee undertakes to do something to, or simply carry, the bailment, *without* recompense. Here the bailee must use a degree of diligence and care adequate to the undertaking.

Commodatum, or *loan for use*, is where the property is intrusted to the bailee without pay, to be used by him, for his own benefit. In this case the bailee must use more care than in either of the preceding cases.

Pignori acceptum, or *pawn*, is the bailment of a thing as a security for a debt. This bailee must use the same care as in the preceding cases.

Locatum, or hiring, is a bailment for reward, by which the hirer gains a temporary qualified property in the thing hired, and the owner acquires an absolute property in the stipend or price. Here the bailee must use due care and diligence.

Locatum is subdivided into three classes, viz.:

Locatio rei, or hiring, by which the hirer gains a temporary use of the thing.

Locatio operis faciendi, where something is to be done to the thing bailed.

Locatio operis mercium vehendarum, where the thing is merely to be carried from one place to another.

Hiring and borrowing are contracts whereby the possession and a transient qualified property in chattels is transferred, for a particular time or use, on condition that the identical goods be restored at the time appointed.

Hiring is always for a price, stipend, or recompense.

Borrowing is merely gratuitous.

This *price*, being calculated to compensate for the *inconvenience*, *risk*, or *hazard*, of loaning, gives birth to the doctrine of *interest*, *usury*, *bottomry*, *respondentia*, and *insurance*.

Interest is a moderate and legal profit allowed money-lenders to recompense them for the *inconvenience* of parting with it.

Usury is an *exorbitant* and *illegal* profit taken by money-lenders.

Sometimes the *hazard* may be greater than the rate of interest allowed by law will compensate, which gives rise to certain practices and *exceptions* to the general rule of law regarding and limiting interest rates, viz.:

Bottomry is in the nature of a mortgage of a ship, whereby the owner or master raises money to enable him to carry on his voyage, and pledges the keel or bottom of the ship as security.

If the ship is lost, the lender loses his money; but if it returns, he receives back his principal and also the premium or interest agreed upon, however it exceed the ordinary and legal rate of interest.

If there be more bottomry loans than one upon the ship, then, contrary to the principle of priority in payment of mortgages on land, here the *last* loan is entitled to be paid *first*, on the principle that the latter loans, by preserving the ship, have saved the earlier ones.

Respondentia is where the loan is not upon the vessel, but the goods and merchandise, which must necessarily be sold or exchanged in the course of the voyage. Here only the borrower personally is bound to answer the contract, and, therefore, said to take up money at *respondentia*.

Insurance is a contract between A and B, that upon A's paying a premium equivalent to the hazard run, B will indemnify or *insure* him against a particular event.

It is founded upon one of the same principles as the doctrine of interest upon loans—that of *hazard*, but not that of inconvenience.

Debt, as a species of personal contract, is any contract whereby a certain sum of money becomes due to the creditor.

Any contract whereby a determinate sum of money becomes due to any person and is not paid, but remains in action merely, is a *contract of debt*.

Debt, therefore, is a species of contract whereby a chose in action, or a right to a certain sum of money, is mutually acquired and lost.

Debts are generally divided into debts of *record*, debts by *special contract*, and debts by *simple contract*, which latter includes *paper credit*.

A debt of record is a sum of money which appears to be due by the evidence of a court of record.

A judgment is a *contract* of the highest nature, being established by the sentence of a court of judicature.

Debts by specialty, or *special contract*, are such whereby a sum of money becomes due, or is acknowledged to be due, by deed or instrument under seal.

A written agreement, not under seal, is classed as a parol or simple contract, and is

usually considered as such, just as much as any agreement by mere word of mouth.

Debts by simple contract are such where the contract upon which the obligation arises is ascertained by mere oral evidence, the most simple of any; or by notes unsealed, which are capable of more easy proof, and, therefore, only better than verbal promise.

Paper credit consists of simple contract debts by bills of exchange, promissory notes, etc.

Bills of exchange, or *drafts*, are open letters of request from one man to another, desiring him to pay a sum named therein to a third person, on his account.

The writer is called the *drawer*; the person to whom written, the *drawee*; and the party to whom payable, the *payee*.

They are either *foreign* or *inland*, and the law upon both is essentially the same.

Promissory notes, or *notes of hand*, are a plain and direct engagement in writing to pay a sum specified, at the time limited, to a person named, or sometimes to his order, or to the bearer at large.

Paper credit may be transferred or assigned, contrary to the general rule of the common law that no chose in action is assignable, which assignment is the *life* of paper credit. It is done by the payee writing his name, *in dorso*, or on the back of it, thereby assigning over his whole property in it to another, called the *endorsee*, who may assign it to another, and so on *ad infinitum*.

Acceptance is a contract by the drawee to pay the bill, grounded on an acknowledgment that the drawer has effects in his hands, or at least credit sufficient to warrant the payment; for, in order to make himself liable, he must *accept* the bill, either verbally or in writing.

Protest is legal notice of *dishonor* to prior parties.

The *object* of protest is to fix the responsibility of prior parties; for, in the absence of such notification, the loss falls on the holder of the bill. A bill dishonored or refused must be demanded of the *drawer* as soon as possible, in order to fix his responsibility.

Title by bankruptcy is that method by which a right is acquired to the property of a bankrupt; for, immediately

non-acceptance - refusal to accept
non-payment - refusal to pay
Dishonor - The three days allowed by law in which a bill must be presented to the drawee for payment of the bill. If it is not presented within this time, the bill is dishonored.
Dishonor of grace - The three days allowed by law in which a bill must be presented to the drawee for payment of the bill. If it is not presented within this time, the bill is dishonored.

upon the act of bankruptcy, the property of the bankrupt's personal estate is vested, by construction of law, in the assignees, and they, when they have collected the whole or converted it into money, distribute it, by equal proportional dividends, among the creditors.

Assets are whatever goods and chattels of a bankrupt may be converted into money.

Title by testament is the method of acquiring personal property according to the express directions of the deceased proprietor, which we call a *testament*.

Title by administration is the method of acquiring personal property also according to the will of the deceased proprietor—not expressed, indeed, but *presumed* by law—which we call *administration*.

A testament or will is the legal declaration of a man's *intentions*, which he *wills* to be performed after his death.

They are *written* and *verbal*, or *nuncupative*, the latter depending on oral evidence, being declared by the testator *in extremis*, before a sufficient number of witnesses, and afterwards reduced to writing.

Testaments are of very high antiquity, being found among the ancient Hebrews, and have existed in England immemorially, whereby the deceased was at liberty to make this predisposition of his estate, dividing it into three equal parts: one to his wife, and one to his heirs or lineal descendants, called their *reasonable parts*; the other was entirely at his own disposal, and, in disposing of which, he was bound, by custom, to remember his lord and the church, by leaving them his two best chattels, which was the origin of *heriots* and *mortuaries*.

An intestate is one deceased who has made no such disposition of his goods as were testable.

Generally speaking, all persons may make wills, unless for want of sufficient *discretion*; as, those *non compos mentis*, male *infants* under the age of fourteen, and females under twelve, etc.; for want of sufficient *liberty* and *free will*, or on account of *criminal conduct*.

A codicil is a supplement to a will, or an addition made to it, by the testator.

we mean, — one who has no goods, — and is a bankrupt

It annexes to, and must be taken as a part of, the testament, being for its explanation, alteration, or to make some addition to, or subtraction from, former dispositions of the testator. This may also be either written or nuncupative.

No testament is of any effect till after the death of the testator.

A testament may be avoided if made by a person laboring under any of the *incapacities* before mentioned.

Also, by making another testament of a *later date*, which annuls all former ones; and, if the last will is but the republication of a former one, it still annuls everything preceding it, and establishes the original or former one again.

Also, by *cancelling* or *revoking* it, which a testator may always do, no matter how strong or irrevocable the terms he may have formerly used therein, for no one's acts or words can alter the disposition of *law*.

Marriage, or the *birth of a child*, is by law construed to be the revocation of a will.

An executor is he to whom another commits, by will, the execution of his last will and testament.

An executor de son tort is one who acts as executor without just authority. He is liable to all the trouble of an executorship without any of the profits or advantages.

An administrator is, in effect, an executor appointed by *law*—that is, he is one appointed by the court to administer upon the goods and effects of a person dying *intestate*.

Administration de bonis non is where, the course of representation or administration being *interrupted*, it is necessary to commit administration afresh of the goods of the deceased not administered by the former executor or administrator.

Administration cum testamento annexo is where there is no executor named in the will, or if any incapable person be named, or a person named refuses to act.

The offices and duties of executors and administrators are in general much the same, except that the former are *bound* to follow the *will*, which the latter are not; and an executor may do many acts before he proves the will, but an administrator can do nothing till letters of administration are granted.

The interests vested in an executor by the *will* of the deceased may be continued and kept alive by the will of the *executor*, because the power of an executor is founded upon the special confidence and actual appointment of the *deceased*; hence he is allowed to transmit that power to another in whom he has equal confidence; but with an administrator it is otherwise, for he is merely the appointee or officer of the law.

The powers and duties of executors and administrators, who are also called *personal representatives*, are: to bury the deceased in a suitable manner, to prove his will, make and swear to an inventory of goods and chattels, whether in possession or *action*, collect the same, pay deceased's debts, next legacies, and then the *residuum* to the residuary legatee, or, if none, to next of kin.

Debts of the deceased must be paid in the following order of priority: funeral charges, expenses of proving will, and the like; debts due to the King or state, on record or specialty; debts preferred by statute; debts of record, as judgments, statutes, and recognizances; debts on specialties, as rents, bonds, and covenants; debts on simple contracts, as notes unsealed and verbal promises.

A legacy is a bequest or gift of goods and chattels by testament; the assent of the executor is necessary to its perfection, and the person to whom it is given is styled the *legatee*.

Legacies are vested or contingent.

A contingent legacy, if it be left to one *when* he attains, or *if* he attains, the age of twenty-one, and he dies before that time, is a *lapsed* legacy.

Vested legacies are legacies to one *to be paid* when he attains the age of twenty-one, and if the legatee dies before that time it goes to his representatives. It is an interest commencing *in presenti*.

If the legatee dies before the testator, the legacy is a lost or *lapsed* legacy, and shall sink into the *residuum*.

A donatio causa mortis is a deathbed gift or disposition of property—that is, when a person, in his last sickness, apprehending his dissolution near, delivers, or causes to be

Probat. proving a will

delivered, to another the possession of any personal goods to keep in case of his decease.

It needs not the assent of his executor, yet it shall not prevail against creditors, and is accompanied with this *implied* trust, that if the donor lives, it shall revert to him being only given in contemplation of death.

Statute of Distributions 22 & 23
 Car II c 10 explained by 29 Car II
 c 30 it is enacted that the
 surplusage of intestates estates
 (except of females-covert which are
 left as at common law, shall
 after the expiration of one full year
 from the death of the intestate
 be distributed in the following
 manner: — one third shall go to
 the widow of the intestate and the
 residue in equal portions to
 his children or if dead to their
 representatives. That is the
 legal descent's descendants: if there
 are no children or legal representa-
 tives subsisting, then a moiety shall
 go to the widow and a moiety to the
 next of kindred in equal degrees and
 their representatives: but no rep-
 resentatives are admitted unless
 collateral, further than the children
 of the intestate's brother & sisters

BOOK III.

PRIVATE WRONGS.

ANALYSIS OF BOOK III.

Private wrongs, for which the laws of England have provided redress:

- { 1. By the mere act of the parties,
- { 2. By the mere operation of law,
- { 3. By both together, or suit in courts; wherein
 - 1. Of courts; and therein of
 - { 1. Their nature and incidents,
 - { 2. Their several species, viz.:
 - 1. Of public or general jurisdiction; as
 - 1. The court of common law and equity,
 - 2. Ecclesiastical courts,
 - 3. Military courts, and
 - 4. Maritime courts.
 - 2. Of private or special jurisdiction.
 - 2. Of the cognizance of wrongs; in the courts
 - 1. Ecclesiastical,
 - 2. Military,
 - 3. Maritime, and
 - 4. Of common law courts; wherein
 - 1. Of the respective remedies and **INJURIES affecting**
 - 1. The rights of private persons;
 - { 1. Absolute, or
 - { 2. Relative.
 - 2. The rights of property
 - 1. Personal,
 - 1. In possession; by
 - { 1. Dispossession, or
 - { 2. Damage.
 - 2. In action; by breach of contracts.
 - 2. Real; by
 - 1. Ouster, or dispossession; of
 - { 1. Freeholds, or
 - { 2. Chattels real.
 - 2. Trespass,
 - 3. Nuisance,
 - 4. Waste,
 - 5. Subtraction,
 - 6. Disturbance.
 - 3. The rights of the Crown.
 - 2. Of the pursuit of remedies; for wrongs and **injuries**
 - 1. By action at common law; wherein of
 - 1. Original,
 - 2. Process.
 - 3. Pleading,
 - 4. Demurrer and issue,
 - 5. Trial, by
 - 1. Record,
 - 2. Inspection,
 - 3. Witness,
 - 4. Certificate,
 - 5. Wager of battel,
 - 6. Wager of law,
 - 7. Jury.
 - 6. Judgment,
 - 7. Appeal,
 - 8. Execution.
 - 2. By proceedings in the courts of equity.

BOOK III.

PRIVATE WRONGS.—Wrongs are the privation of right, and are divisible into *private* wrongs and *public* wrongs.

Private wrongs are an infringement or privation of the private or civil rights of *individuals*, and are frequently termed *civil injuries*.

Public wrongs are a breach and violation of public rights and duties, which affect the whole *community*, and are distinguished by the appellation of *crimes* and *misdemeanors*.

The remedy for private injuries is by application to courts of justice—that is, by *civil suit* or *action*—for which purpose courts of justice are instituted, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws by which rights are defined and wrongs prohibited.

This *redress* of private wrongs or civil injuries may be effected by the mere act of the *parties*, by mere operation of law, or by both together, or *suits* in court.

Redress by act of the parties is of two kinds, viz.: that by act of the injured party *only*, and that by joint act of *all* the parties.

Redress by the sole act of the party injured is by *defence* of one's self or relations; by *recaption* of goods; by entry on lands and tenements, to oust intruders; by *abatement* of nuisances without riot; by *distress*, for rent, damages, amercements, etc.; and by *seizing of heriots*.

Self-defence is justly called the *primary* or *first law of nature*, and is not, nor can it be, taken away by the law of society. It is held an excuse for breaches of the peace, and even homicide itself.

Recaption happens when any one hath deprived another

of his property in goods or chattels, and the owner claims and takes them wherever he happens to find them.

A nuisance is anything that worketh hurt, inconvenience, or damage, or unlawfully annoys another.

Distress is the taking of a personal chattel out of the possession of the wrong-doer into the custody of the party injured, to procure satisfaction for the wrong committed.

A man's tools and utensils of trade cannot be distrained, nor things which cannot be rendered again in as good plight as when distrained. *as milk fruit &c*

Replevy—*replegiare*—i. e., to take back the pledge—is when a person distrained upon applies to the sheriff or his officers, and has the distress returned into his own possession upon giving security to try the right of taking it.

Redress by joint act of all the parties is by *accord* and *arbitration*.

Accord is a satisfaction *agreed* upon between the party injured and the party injuring, which, when performed, is a bar of all actions on this account.

Arbitration is where the parties submit all matters in dispute to the judgment of two or more arbitrators.

Redress by the mere operation of law is by *retainer* and *remitter*.

Retainer is where a creditor is executor or administrator, and the law permits him to *retain* his own debt before other creditors in equal degree; otherwise, he must sue himself, which would be an absurdity, and leave him in a worse condition than other creditors.

Remittitur is where one has the true property in lands, but is out of possession thereof, and has no right to enter without recovering possession in an action—hath afterwards the freehold *cast* upon him by some subsequent, and, of course, defective, title; in this case he is *remitted* or sent back by operation of law to his ancient and more certain title.

Redress effected by act of both law and the parties is by *suit* or action in the *courts* of justice, wherein may be considered the *courts themselves* and the *cognizance of wrongs or injuries* therein.

Of courts in general, we may consider their *nature and incidents*, and their several *species*.

Must be repaid within
 5 days. - If not appeared
 will be sold

THEIR NATURE AND INCIDENTS.—A court

is a place wherein justice is judicially administered.

Incidents, or *constituent parts*, to all courts are plaintiffs, defendants, judge, attorneys, etc.

Courts are either of *record* or *not of record*.

A court of record is that where the acts and judicial proceedings are enrolled or *recorded* for a perpetual memorial and testimony, which rolls are called the *records* of the court, and are of such high and supereminent authority that their truth cannot be called in question.

A court not of record is the court of a private man, whom the law will not entrust with any discretionary power, as courts baron and other inferior jurisdictions.

An attorney is one who is put in the place, stead, or turn, of another, to manage his matters of law.

It is a general rule that where there is a *legal right* there is also a *legal remedy*, by suit or action at law, whenever that right is invaded.

A suit or action is the lawful demand of one's right.

It is an ordinary *proceeding* in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence.

Fictions in law are those things that have no real essence in their own body, but are acknowledged and accepted in law for some special purpose. They are highly beneficial and useful, as the maxim is ever invariably observed that no fiction shall extend to work an injury, its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law.

AS TO THEIR SPECIES.—Courts are of a *public* or *general* jurisdiction, or of a *private* or *special* jurisdiction.

Courts of a public or general jurisdiction are: the Courts of Common Law and Equity, the Ecclesiastical Courts, the Military Courts, and the Maritime Courts.

The Courts of Common Law and Equity are: the Court of *Piepodre*, the Court Baron, the Hundred Court, the County Court, the Court of Common Pleas, of King's Bench, of Exchequer, of Chancery, of Exchequer Chamber, and the House of Peers, to which may be added, as auxiliaries, the Courts of Assize and Nisi Prius.

a. against a court and
 defendants - 169 has a bonister

Tolt = County = shire
hundred

Two justices customary
Court relating to tenants
also is known as a Court
of common law
the standing justice

The Court of Piepoudre, so called from the dusty feet of the suitors, is a court of record incident to every fair and market. They are instituted to do justice expeditiously among the variety of persons that resort from distant places to a fair or market. It is the lowest court.

The Court Baron is a court incident to every manor of the kingdom, to be holden by the steward within the said manor.

A Hundred Court is only a larger Court Baron, being held for all the inhabitants of a particular hundred instead of a manor.

A County Court is a court incident to the jurisdiction of the sheriff.

the jurisdiction
of the sheriff

A Court of Common Pleas is for the trial of all matters of law arising in civil cases, whether real, personal, or mixed, and compounded of both.

Pleas or suits are of two sorts: *pleas of the Crown*, which comprehend all crimes and misdemeanors wherein the King (on behalf of the public) is the plaintiff; and *common pleas*, which include all *civil* actions depending between subject and subject.

complaints of two divisions
one for redress of royal wrongs
and the court or justice
part of it subdivided into
Court of equity - Court of common law

In this court only can *real* actions be originally brought, and all other or personal pleas between man and man, this court sitting to hear and determine all matters of *law* arising in *civil* causes, whether *real*, *personal*, or *mixed*.

The Court of King's Bench, so called because the King used formerly to sit there in person, is the *supreme court of common law* in the kingdom.

The Court of Exchequer is a court of inferior rank to that of the King's Bench or Common Pleas, and is intended principally to order the revenues and collect the debts and duties of the Crown. *Equity, appeal to Lords - Law to Court*

Chancery
general jurisdiction
in equity
judicial court
of common law
Equity

The High Court of Chancery is, in matters of *civil* property, the most important of any of the King's superior and original courts of justice, and derives its name from the judge or lord *chancellor*, who presides over it.

The Court of Exchequer Chamber is only a court of appeal to correct the errors of other jurisdictions.

The House of Peers is the *supreme court of judicature* in the kingdom; it has no original jurisdiction, but only upon appeals and writs of error.

Assize - to take the verdict of a free man upon
of jury called an *assize* and now used for the trial of
should disputes. *Writ of Habeas Corpus* is a consequence of the
commission of *assize* - whereby the prisoner is brought to the trial and that
in some cases to take with the prisoner *Writ of Habeas Corpus*

The Courts of Assize and Nisi Prius are composed of two or more commissioners, who are twice every year sent by the King all over the kingdom to try certain cases by *jury*, etc.

The Ecclesiastical Courts were various, and exercised jurisdiction over such ecclesiastical matters in which it was supposed the Court of Rome, or the Pope, had proper or rightful preference. They are not courts of record.

The *Ecclesiastical* and *Lay* Courts were first separated by William the Conqueror. In the times of our Saxon ancestors there was no distinction between them.

The Military Courts are also not courts of record, and the only permanent one is that of *chivalry*, the courts *martial* annually established by act of Parliament being only temporary.

The Maritime Courts are the Courts of Admiralty and their courts of appeal. They have power and jurisdiction to determine all maritime injuries arising upon the seas.

Like the Ecclesiastical Courts, the proceedings in these courts are according to the method of the civil law, and they are not courts of record.

Courts of a private or special jurisdiction are those whose jurisdictions are private and special, confined to particular spots, or instituted to redress only particular injuries.

These particular jurisdictions, derogating from the general jurisdiction of the courts of common law, are ever strictly restrained, and cannot be extended further than the express letter of their privileges will most explicitly warrant.

COGNIZANCE OF PRIVATE WRONGS BY THE COURTS.—All private wrongs or civil injuries are cognizable either in the courts ecclesiastical, military, maritime, or those of common law.

In the Ecclesiastical Courts the injuries cognizable are pecuniary, matrimonial, and testamentary.

The pecuniary injuries are: subtraction of tithes, ^{or withholds} non-payment of ecclesiastical dues, spoliation, dilapidations, non-repairs of the church, and the like.

The matrimonial injuries are: jactitation of marriage—i. e., where one boasts that he is married to another,

unless before the day prefixed by the judges of the court into the country in question. This they are now to do in the vacations preceding each Easter

whereby a common reputation of their marriage may ensue—subtraction of conjugal rights, inability for the marriage state, and refusal of decent maintenance to the wife.

The testamentary injuries are: disputing the validity of wills, obstructing of administrations, and subtraction of legacies.

The Ecclesiastical Courts or Tribunals subsist and are admitted, in England, not by any right of their own, but upon bare sufferance and toleration from the municipal laws, and they are principally guided by the rules of the civil and canon laws. They must have recourse to the laws of England to be informed how far their jurisdiction extends, or what causes are permitted, and what forbidden, to be discussed or drawn in question before them, the only uniform rule to determine the jurisdiction of the courts in England being the common law.

The Ecclesiastical Courts have no other process than that of excommunication to enforce their sentences when pronounced, and the courts of common law will award a prohibition against the proceedings of the spiritual courts when they are manifestly repugnant to the fundamental maxims of the municipal law. Otherwise they lend a supporting hand to their authority.

In the Military Courts the injuries cognizable are: injuries in point of honor, encroachments in coat-armour, precedence, etc.

The proceedings are in a *summary* method, and its jurisdiction is declared by statute to be, “that it hath cognizance of contracts touching deeds of arms or of war out of the realm, and also of things which touch war within the realm, which cannot be determined or discussed by the common law, together with other usages and customs to the same matters appertaining.”

In the Maritime Courts the injuries cognizable are: injuries which, though in their nature of common law cognizance, yet being committed on the high seas, out of the reach of ordinary courts of justice, are, therefore, to be remedied in a peculiar court of their own.

The proceedings of a Court of Admiralty much resemble those of the civil law, but are not entirely founded thereon,

as they likewise adopt and make use of other laws as occasion requires.

In the Common Law Courts the injuries cognizable are all the possible injuries whatsoever that do not fall within the exclusive cognizance of either the *ecclesiastical*, *military*, or *maritime* tribunals.

IN THE COURTS OF COMMON LAW, in treating of their *cognizance of private wrongs or injuries*, may be considered the wrongs or injuries *themselves*, and their *remedies*, and the pursuit of those remedies in the several courts.

The plain and natural remedy for every species of wrong or injury cognizable by the Courts of Common Law is, in general, by putting the party injured into possession of that right whereof he is unjustly deprived.

This is effected by delivery or restoration of the *thing* detained, or subject-matter in dispute, to the rightful owner; or, where that remedy is impossible or inadequate, by giving the party injured a satisfaction in *damages*.

The instruments by which these remedies may be obtained are by suits, or actions at law, which are distinguished into three kinds: *real*, *personal*, and *mixed*.

Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof, or damages for some injury done to his person or property.

The former are said to be founded on *contracts*, and the latter on *torts*.

Real actions concern real property only, and are such whereby the plaintiff claims title to have any lands or tenements, rents, commons, or other hereditaments, in fee-simple, fee-tail, or for term of life.

Mixed actions are suits partaking of the nature of the other two, whereby some real property is demanded, and also personal damages for a wrong sustained.

All injuries are either with or without *force* or violence.

WRONG OR INJURIES, and their remedies.—They are either injuries to the *rights of persons*, or injuries to the *rights of property*.

Injuries to the rights of persons are either to their *absolute* or *relative* rights.

Injuries to the absolute rights of individuals

are injuries to *personal security*, to *personal liberty*, and to *private property*.

Injuries to personal security are against one's life, limbs, body, health, or reputation.

Injuries to the limbs and body are threats, assaults, battery, wounding, and mayhem.

Threats and *menaces*, alone, only become an injury or wrong when attended with some consequent *inconvenience*.

Assault is an attempt or offer to beat another without touching him.

Battery is the unlawful beating of another.

Wounding consists in giving another some dangerous hurt. *aggravated species of battery*

Mayhem consists in violently depriving another of the use of a member proper for his defence in fight.

Injuries to health are by any unwholesome practices that effect, or tend to any apparent damage, to a man's vigor or constitution.

Injuries to reputation are: slander and malicious words, libels, and malicious prosecutions.

Slander is the malicious defaming of a person in his reputation, profession, or livelihood, by words tending to his damage or derogation.

Libels are injuries affecting a man's reputation by printing, writing, pictures, signs, or the like, which, by setting a man in an odious or ridiculous light, thereby tend to diminish his reputation.

The action of trespass on the case is a universal remedy given for all personal wrongs and injuries *without* force, or where the act is *not immediately* injurious, but only by consequence, and collaterally.

It is so called because the plaintiff's whole *case*, or cause of complaint, is set forth at length in the original writ.

The action of trespass vi et armis is the remedy for injuries accompanied *with* force or violence, or where the act done is in itself an *immediate* injury to another's person or property. *odio et contumelia*

Injuries to personal liberty are by false imprisonment only, which consists in any kind of confinement, or detention of another, without sufficient authority. *Homo de*

A third way of destroying or injuring a man's reputation is by publishing malicious insinuations or prosecutions against him which under the mask of justice and public spirit are sometimes used to the ruin of the

It is necessary that the plaintiff should be some particular defendant to those injuries which are called trespassing his action with a good plea of a fine or a judgment

Habeas corpus (have the body) is the great and efficacious writ in all cases of illegal confinement. It is a writ of *right*, which may not be denied, and is directed to the person detaining another, commanding him to produce the *body* of the prisoner, with the day and cause of his caption and detention, before the judge or court awarding the writ, that they may enquire into the cause of the commitment, and ascertain if it be just.

Injuries to the relative rights of persons, or their rights in their relations to each other in society, are such injuries as affect the rights of husbands, parents, guardians, and masters.

Injuries to a husband are: abduction, or taking away his wife; adultery, or criminal conversation with her; and beating or otherwise abusing her.

Injuries to parents and guardians are: abduction of their children or wards.

Injuries to masters are: retaining his servants, or beating them.

INJURIES TO THE RIGHTS OF PRIVATE PROPERTY are either to those of *personal* or *real* property.

Injuries to personal property may be to property in *possession* or in *action*.

Injuries to personal property in possession are: by *dispossession*, or by *damage* while in the owner's possession.

Dispossession may be effected by unlawful *taking*, and by an unlawful *detaining*, though the original taking might be lawful.

The unlawful taking of goods and chattels is remedied by actual *restitution*—obtained by action of replevin or by satisfaction in *damages*—obtained by action on the case, trespass, or trover.

For the unlawful detaining of goods lawfully taken, the remedy is also by actual *restitution*—obtained by action of replevin or detinue, or by satisfaction in *damages*—by action on the case, or trover, and conversion.

For damage to personal property while in the owner's private use and immunity. For this however the law has given a very adequate remedy in *damages* either by action of *conspiracy* which cannot be brought but against two at the least or which is the more usual way of a *special action on the case* for false & malicious

During in the custody of the law—the taking them back by force is looked upon as an atrocious wrong and shall constitute a *prosecution* for which the district court or the county court may be empowered to issue a writ of *habeas corpus* if they were going to prison, or they may take a *special action on the case* for false & malicious

possession, the remedy is in *damages*; by action of trespass *vi et armis* if the act be *immediately* injurious; or by action on the case if the act occasions *consequential* damage.

For the action of replevin, being founded upon a distress wrongfully taken and without sufficient cause, is a redelivery of the pledge or thing taken in distress to the owner, upon his giving security to try the right of the distress, and to restore it if the right be adjudged against him; after which the distrainor may keep it till tender made of sufficient amends, but must then redeliver it to the owner.

The action of detinue is for the recovery of the possession of goods in specie.

It is not much used, having given place to the action of trover.

The action of trover, in its origin, was an action of trespass on the case for the recovery of damages against such a person as had found another's goods and refused to deliver them on demand, but converted them to his own use.

This action having certain advantages over that of detinue, such as requiring a less degree of certainty in describing the goods, by *fiction of law*, actions of *trover* were at length permitted to be brought, the injury being in the *conversion*.

Injuries to personal property in action arise by breach of *contracts*, express or *implied*.

Breaches of express contracts are: by non-payment of *debts*, by non-performance of *covenants*, and by non-performance of *promises* or *assumpsits*.

Breaches of implied contracts are such as arise from the *nature and constitution of government*, as the non-payment of money which the laws have directed to be paid; and such as arise from *reason and construction of law*, as the non-performance of legal **presumptive or implied assumpsits**, viz.: of a *quantum meruit*, of a *quantum valebat*, of expending money for another, of receiving money to another's use, of an *insimul computassent* on an account stated, of performing one's duty in any employment with integrity, diligence, and skill.

Debt is a sum of money due by certain and express agreement.

or from a breach in case that any were actually injured

A **promise** is in the nature of a verbal covenant, and ~~needs~~ nothing but the solemnity of writing and sealing to ~~make~~ it absolutely the same.

Qui tam actions, or *popular actions*, are such where, usually, forfeitures created by statute are given at large to any common informer, or any person who will sue for the same. Sometimes part is given to the King, state, poor, or public use, and the other part to the informer or prosecutor.

Express warranty of chattels is that whereby the warrantor covenants or undertakes to *ensure* that the thing which is the subject of the contract is as represented.

INJURIES TO REAL PROPERTY are: ouster, trespass, nuisance, waste, subtraction, and disturbance.

Ouster, or dispossession, is a wrong or injury that carries with it the amotion or deprivation of possession, for thereby the wrong-doer gets into the actual occupation of the land or hereditament, and obliges him that hath a right to seek his legal remedy in order to gain possession and damages for the injury sustained.

It is either from *freeholds* or from *chattels real*.

Ouster from freeholds is effected by abatement, intrusion, disseizin, discontinuance, and forcement.

Abatement is the entry of a stranger after the death of the ancestor and before the *heir*.

Intrusion is the entry of a stranger, after a particular estate of freehold is determined, before him in *remainder* or *reversion*.

Disseizin is a wrongful putting out of him that is *seized* of the freehold.

Discontinuance is where a tenant in tail, or husband of a tenant in fee, makes a larger estate of the land than the law alloweth.

Deforcement includes any other wrongful detainer of the freehold from him who hath the *property*, but who never had the possession.

Ouster from chattels real is from estates by statute-merchant, statute-staple, and *elegit*, or from an estate for years. It is affected by a kind of disseizin or ejectment.

A writ of *ejectione firmæ*, or *action of trespass in ejectment*, lies where lands, etc., are let for a term of

See Old Writs 6X
qui

Writ of *quare respondit infra terminum*
 which lies not against the wrong doer or his
 him self, but his *freedom* or other person claiming
 under him.

years, and the lessee is ousted from his term, by which he
 recovers possession of his term and damages.

Ejectment is now the usual method adopted for trying
 titles to land instead of an action real.

Trespass is an entry on another man's ground without
 lawful authority or cause of justification, and doing some
 damage, however inconsiderable, to his property.

The law always couples the idea of force with that of tres-
 pass or intrusion upon the property of another.

Nuisance, or annoyance, signifies anything that work-
 eth hurt, inconvenience, or damage.

It may be either a *public* and *common* nuisance, or a *private*
 nuisance, which latter is anything done to the hurt or annoy-
 ance of the corporeal or incorporeal hereditaments of an-
 other.

Waste is a spoil and destruction of an estate, either in
 houses, woods, or lands, by demolishing, not the temporary
 profits only, but the very substance of the thing, to the injury
 of him that hath the present interest, or him in remainder or
 reversion.

It is either *voluntary*, as by actual and designed demoli-
 tion; or *permissive*, arising from mere negligence and want
 of care.

Subtraction is where a person who owes any suit,
 duty, custom, or service to another, withdraws or neglects
 to perform it, as rents and other services due by tenure, cus-
 tom, and the like.

It differs from disseizin in that the latter strikes at the very
 title of the party injured, and amounts to an ouster or actual
 dispossession, whereas subtraction is committed without
 any denial of the right, and consisting merely of non-per-
 formance.

Disturbance is usually a wrong done to some incorpo-
 real hereditament by hindering or disquieting the owners in
 their regular and lawful enjoyment of it. It may be of
 franchises, of commons, of ways, of tenure, or of patronages.

The pursuit of remedies in the courts, furnished
 by the laws of England, is by *suit* or action in the *Courts of*
Common Law, or by proceedings in the *Courts of Equity*

OF ACTIONS IN THE COURTS OF COMMON

Toll'd - taken away by distress
 Personal remedy - Distress
 the remedy - Act of self
 moved against the writs
 5/11/11

quare impedit - therefore or why
 did he hinder or disturb
 Writ against the lord for temporary
 injuries, and other wrongs

in personal actions in England—abolished

LAW.—In an *action* in the Court of Common Pleas (which is the original and proper court for prosecuting *civil* suits), the general and orderly parts are: the original writ, the process, the pleading, the issue or demurrer, the trial, the judgment and its incidents, the proceedings in the nature of appeals, and the execution.

The original writ, or *præcipe*, is the beginning or foundation of a suit, and is directed to the defendant by the officer of the court, commanding him to do some certain thing, as to *appear* in court, or *show cause* to the contrary.

The process is (or includes) the means of *compelling* the defendant to appear in court, viz.: either by summons, attachment, *distringas*, *capias ad respondendum*, and *testatum capias*, *alias*, and *pluries* writs, writ of *exigi facias*, proclamations and outlawry, appearance and common bail, arrest and special bail.

The summons is a written or verbal warning to appear in court at the return of the original writ.

The writ of attachment issues on the non-appearance of the defendant at the return of the original writ, whereby the sheriff is commanded to *attach* him by seizing some of his goods, which he shall forfeit if he do not appear, or by making him find safe pledges or securities, who shall be amerced in case of his non-appearance.

The writ of distringas, or distress *infinite*, issues after attachment if the defendant forfeits his security and does not appear.

The writ of capias ad respondendum issues, commanding the sheriff to take the *body* of the defendant who neglects to appear after summons, attachment, and *distringas*.

The writ of testatum capias issues when the sheriff returns that the defendant is *non est inventus*, or not to be found in his bailiwick, and is directed to the sheriff of the county in which the defendant is supposed to be, reciting the former writ, and that it is *testified* that the defendant lurks or wanders in his bailiwick, wherefore he is commanded to take him.

The writ of exigi facias, or *exigent*, required the sheriff to cause the defendant to be proclaimed, required,

such outlawry is putting a man out of the protection of the law.

or exacted, in five county courts successively, to render himself; and if he does, then to take him as in a *capias*; but if he does not appear, he shall then be outlawed.

Outlawry is putting a man out of the protection of the law, so that he is incapable to bring an action for redress of injuries, and is also attended with the forfeiture of all one's goods and chattels.

Appearance is when the defendant answers any of the different writs commanding him to appear in court by duly presenting himself in person or by attorney.

Bail is security given for one's appearance in court at a future day.

Bail is from the French word *bailler*, to deliver, because the defendant is bailed or delivered to his securities upon their giving security for his appearance, and is supposed to continue in their friendly custody instead of going to jail.

PLEADINGS are the mutual altercations between the plaintiff and defendant reduced to writing.

The general and orderly parts of pleading are: the declaration, the defence, the plea, the replication, the rejoinder, the sur-rejoinder, the rebutter, the sur-rebutter, etc.

The declaration, narratio or count, anciently called the *tale*, is the first pleading in which the plaintiff sets forth his cause of complaint at length.

Local actions are where possession of land is to be recovered, or damages for an actual trespass, or for waste, etc., affecting land.

Transitory actions are for injuries which might happen anywhere, as debt, detinue, slander, and the like.

Venue or *visne* is the *vicinia* or neighborhood in which the injury is declared to be done.

A nonsuit is when the plaintiff neglects to deliver or file a declaration for two terms after the defendant appears, or is guilty of other delays or defaults against the rules of law; or where, in any subsequent stage of the action, he is adjudged not to follow or pursue his remedy as he ought to do; in which case a nonsuit, or *non-prosequitur*, is entered, and he is said to be *non-pros'd*.

A retraxit is an open and voluntary renunciation by the

It is generally usual in actions upon the case, to set forth several causes by different counts in the same declaration. so that if the plaintiff fails in the proof of one, he may succeed in another.

All writs subsequent to the original not issuing out of chancery, and being grounded on what has passed in court, or consequent on the writs return are called judicial writs.

plaintiff of his suit in court, whereby he forever loses his suit.

A discontinuance is when the plaintiff leaves a chasm in the proceeding of his cause, as by not continuing the process regularly from day to day, and from time to time, as he ought to do.

Defence, in its true legal sense, signifies, not a justification, protection, or guard, but merely an opposing or denial of the truth of the validity of the complaint.

Claim of cognizance or *conusance* is a claim to have the action tried in some special jurisdiction. It must be claimed before defence made, if at all.

Imparlance is a continuance of the cause, which the defendant is entitled to demand, and may, before he pleads, have granted by court, to see if he can end the matter amicably, without further suit, by talking with the plaintiff.

Oyer.—The defendant may crave *oyer* of the writ, or of the bond or other specialty, upon which the action is brought—that is, to *hear* it read to him.

A plea is the defendant's answer of fact to the plaintiff's declaration.

Pleas are of two sorts: *dilatory pleas* and *pleas to the action*.

Dilatory pleas are such as tend merely to delay or put off the suit by questioning the *propriety of the remedy*, rather than by denying the injury.

They are: to the jurisdiction of the court, to the disability of the plaintiff, or in abatement.

Pleas to the action are such as dispute the very *cause* of suit or answer to the merits of the complaint.

They are made by confessing or denying any *cause* of action, and are either *general* or *special*—pleas that totally deny the cause of complaint being either the *general issue* or a *special plea in bar*.

The general plea or *general issue* is what traverses, thwarts, and denies at once the whole declaration without offering any special matter whereby to evade it.

An issue is a fact affirmed on one side and denied on the other.

Special pleas are usually in the affirmative, though

as in trespass either *vi et armis* or in the case *non culpabiliter* not guilty; in debt upon contract *riches* debt he owes nothing; in debt on bond *non est factum*

it is not his deed. on an *assumpsit*, *non assumptum* he made no such promise. On a real action *non est factum* that no wrong done; *non disseisin* no disseisin.

sometimes in the negative, but they always advance some new fact not mentioned in the declaration, and then they must be averred to be true in the common form—"and this he is ready to verify."

An estoppel is a *special plea in bar*, which happens where a man has done some act or executed some deed which *estops* or precludes him from averring anything to the contrary.

The conditions and qualities of a plea are: that it be single and contain only one matter; that it be direct and positive, and not argumentative; that it have convenient certainty of time, place, and persons; that it answer the plaintiff's allegations in every material point, and that it be so pleaded as to be capable of trial.

A motion is an occasional application to court by the parties or their counsel, in order to obtain some rule or order of court necessary in the progress of a cause.

The replication is when the *plea* is in, if it does not amount to an issue, but only evades it, the plaintiff may plead again, and reply to the defendant's plea.

The subsequent pleadings are: the rejoinder, the sur-rejoinder, the rebutter, the sur-rebutter, etc.

To give color is to suppose one to have an appearance or color of title—bad in deed in point of law.

Departure in pleading consists in varying from the title or defence which the party has once insisted on. This must be carefully avoided; the replication must support the declaration, and the rejoinder the plea.

New or novel assignment is when the plaintiff, who has alleged in his declaration a *general* wrong, in his replication, after an *evasive* plea by the defendant, reduces that general wrong to more *particular certainty* by assigning the injury afresh in such manner as clearly to ascertain and identify it.

Duplicity in pleading must be avoided by every plea being simple, entire, connected, and confined to one single point.

Issue and demurrer.—**Issue** is where the parties, in the course of pleading, come to a point affirmed on one side and denied on the other; which, if it be matter of law,

This may be done by protestation where the party interposes an oblique allegation or denial of some fact, such as "I do or do not," and at some time

Other replication This doesn't mean objection in an answer called a rejoinder Plaintiff may answer by sur-rejoinder; upon which defendant may rebut. Or C. J. answer him by another rebutter

is called a *demurrer*; but, if matter of fact, it still retains the name of an *issue of fact*.

A **demurrer** confesses the facts to be true, but denies the law arising upon those facts.

Continuance is the detaining of the parties in court from time to time.

Plea of puis darien continuance, or *since the last adjournment*, is where the defendant is permitted to plead some new matter that has arisen since he has pleaded, or even after issue or demurrer.

TRIAL is the examination of the matter of *fact* put in issue.

The several species of trial are: by record, by inspection or examination, by certificate, by witnesses, by wager of battel, by wager of law, and by *jury*.

Trial by the record is only had when the existence of such record is the point in issue, as where a matter of record is pleaded in any action, as a fine, judgment, etc., and the opposite party pleads "*nul tiel record*."

Trial by inspection, or *examination*, is had by the court, principally when the matter in issue is the evident object of the senses, and where, for the greater expedition of a cause, the judges, upon the testimony of their own senses, decided the point in dispute.

Trial by certificate is where such certificate must have been conclusive to a jury, as where the evidence of the person certifying is the only proper criterion of the point in dispute.

Trial by witnesses, or without the intervention of a jury (the method in the civil law), is where the judge is left to form his own sentence upon the credit of the witnesses examined.

Trial by wager of battel, or *judiciary duel*, is in the nature of an appeal to Providence, under an apprehension and hope that heaven would give the victory to him who had the right.

Trial by wager of law is only had where the matter in issue had been privately transacted between the parties themselves, without witnesses present, and consisted in the

avoiding a direct affirmation or denial

defendant's discharging himself from the claim on his own oath, bringing with him at the same time into court eleven of his neighbors to swear that they believed his statement to be true.

Trial by jury, or *per pais* (by the country), is of two kinds: *extraordinary*, or that of the grand assise or grand jury, consisting of sixteen jurors, instituted by Henry II. to do away with the barbarous custom of duelling, etc.; and *ordinary*, by a jury of twelve free and lawful men of the body of the county.

Juries were either *special*, as where the causes were of too great nicety for the discussion of ordinary freeholders, or where the sheriff was suspected of partiality; or *common*, as one returned by the sheriff according to the directions of statute.

Challenges are exceptions made to jurors, and are either to the *array* or to the *polls*.

Challenges to the array are at once an exception to the *whole* panel.

Challenges to the polls are exceptions to *particular* jurors, and are of four kinds, viz.:

Propter honoris respectum, as if a lord of Parliament be empanelled on a jury, he may be challenged by either party or may challenge himself.

Propter defectum, as for defect in estate sufficient to qualify one to be a juror, etc.

Propter affectum, as for suspicion of bias or partiality.

Propter delictum, as for some crime that affects the credit of the juror.

A tales is a supply of such men as are summoned upon the first panel in order to make up a deficiency in the same.

Evidence signifies that which demonstrates, makes clear, or ascertains, the truth of the very fact or point in issue, either on the one side or the other. No evidence ought to be admitted on any other point.

A verdict is the finding of the jury.

A special verdict is where the jurors state the facts as they find them to be proved, and pray the advice of the court thereon.

Another species of extraordinary jury is the jury to try an attaint — consists of 24 men, called grand jury to distinguish it from first or petit jury

JUDGMENT is the *sentence of the law* pronounced by the court upon the matter contained in the record.

A **judgment** is either upon demurrer, upon a verdict, by confession or default, or by nonsuit or retraxit, and may be *interlocutory* or *final*.

Final judgment is such as at once puts an end to the action.

Interlocutory judgments are such as are given in the middle of a cause, upon some plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the suit.

EXECUTION is putting the sentence of law in force.

The writ of habere facias possessionem is a writ of seizin of the freehold directed to the sheriff, commanding him to give actual possession to the plaintiff of lands recovered by him at law.

The writ of capias ad satisfaciendum is an execution of the highest nature, depriving a man of his liberty till he makes the satisfaction awarded.

The writ of scire facias is a judicial writ, founded upon some record, and requiring the person against whom it is brought to show cause why the party bringing it should not have the advantage of such record.

The writ of fieri facias commands the sheriff to seize and sell the defendant's goods and chattels, sufficient to satisfy the judgment and costs.

The writ of levari facias commands the sheriff to seize certain of the defendant's lands, to satisfy the plaintiff's demands.

PROCEEDINGS IN THE COURTS OF EQUITY differ from those in the Courts of Common Law, principally in three points, viz. :

In the mode of proof—by a discovery on the oath of the party, which gives a jurisdiction in matters of account and fraud.

In the mode of trial—by depositions taken in any part of the world.

In the mode of relief—by giving a more specific and extensive remedy than can be had in the Courts of Common Law, by executing agreements, staying waste or other

injuries by injunction, directing the sale of encumbered lands, by the true construction of the securities for money, by considering them merely as a pledge, and by the execution of trusts or uses in a manner analogous to the law of legal estates.

Equity, in its true and genuine meaning, is the soul and spirit of all law; *positive* law is construed, and *rational* law is made, by it.

BOOK IV.

PUBLIC WRONGS.

ANALYSIS OF BOOK IV.

Public wrongs; in which are considered

1. The general nature of crimes and punishments,
2. The persons capable of committing crimes,
3. Their several degrees of guilt; as
 1. Principals,
 2. Accessories.
4. The various crimes; more peculiarly offending
 1. God and religion,
 2. The law of nations,
 3. The King and government; viz.:
 1. High treason,
 2. Felonies injurious to the prerogative,
 3. Præmunire,
 4. Misprisons and contempts.
 4. The commonwealth; viz.: offences against
 1. Public justice,
 2. Public peace,
 3. Public trade,
 4. Public health,
 5. Public economy.
 5. Individuals; being crimes against
 1. Their persons; by
 1. Homicide,
 2. Other corporeal injuries.
 2. Their habitations,
 3. Their property.
5. The means of prevention; by security for
 1. The peace, or
 2. The good behavior.
6. The method of punishment; wherein of
 1. The several courts of criminal jurisdiction,
 2. The proceedings therein.
 1. Summary, or
 2. Regular; by
 1. Arrest,
 2. Commitment and ball,
 3. Prosecution; by
 1. Presentment,
 2. Indictment.
 3. Information,
 4. Appeal.
 4. Process,
 5. Arraignment, and its incidents.
 6. Plea and issue,
 7. Trial and conviction,
 8. Clergy,
 9. Judgment,
 1. Forfeiture.
 2. Corruption of blood.
 10. A voider of judgment; by
 1. Falsifying or reversing the attainer,
 2. Reprieve or pardon.
 11. Execution.

It is a melancholy fact, that among the variety of actions which men are daily liable to commit, no less than a hundred and sixty have been declared by act of parliament to be felonies without benefit of clergy, or in other words to be worthy of instant death.

BOOK IV.

PUBLIC WRONGS, being breaches of general and public rights, affect the whole community, and are called crimes and misdemeanors, in treating of which may be considered the general nature of crimes and punishments, the persons capable of committing crimes, their several degrees of guilt, the several species of crimes, the means of preventing crime, and the method of punishment.

GENERAL NATURE OF CRIMES AND THEIR PUNISHMENT.—A crime or misdemeanor is an act committed or omitted in violation of a public law either forbidding or commanding it.

A crime, in its *limited* sense, is confined to felony. They are indictable, and are defined and punishable by statute and common law.

A misdemeanor, in its *limited* sense, is a lesser degree of crime, and includes offences inferior to felony, but still punishable by indictment and other prescribed proceedings.

Offences are crimes not indictable, but punishable summarily, or by forfeiture of a penalty.

Misprisons and contempts are all such *high offences* as are under the degree of capital.

Crimes are distinguished from *civil injuries* in that they are a breach and violation of the public rights due to the whole community.

In all cases the crime includes an injury.

Every public offence is also a *private wrong*, because it affects the individual as well as the community.

Punishments may be considered with regard to the power, the end, and the measure of their infliction.

The power or right of inflicting human punishments,

for natural crimes, or such as are *mala in se*, was, by the law of nature, vested in every individual; but, by the fundamental contract of society, is now transferred to the sovereign power, in which is also vested, by the same contract, the right of punishing positive offences, or such as are *mala prohibita*.

The end of human punishment is to prevent future offences—by amending the offender, by deterring others through his example, and by depriving him of the power to do future mischief.

The measure of human punishment must be determined by the wisdom of the sovereign power, and not by any uniform rule, though that wisdom may be regulated and assisted by certain general and equitable principles.

The persons capable of committing crimes are all persons, unless there be in them a *defect of will*; for, to constitute a legal crime, there must be both a vicious *will* and a vicious *act*.

As a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act, without a vicious will, is no crime at all.

The will is wanting, or does not concur with the act, in three cases, viz.:

First, where there is a defect of understanding, as infancy, idiocy, lunacy, and intoxication, which last, however, is no excuse.

Second, where no will is exerted, as misfortune or chance, and ignorance or mistake of fact.

Third, where the act is constrained by force and violence, as from compulsion or inevitable necessity, which is that of civil subjection; of *duress per minas*, choosing the least of two evils where one is unavoidable; and want or hunger, which is no legitimate excuse.

Infants under fourteen years of age are *prima facie* adjudged to be incapable of crime.

If a lunatic has lucid intervals of understanding, he must answer for what he does in those intervals—*ignorantia legis neminem excusat*.

PRINCIPALS AND ACCESSORIES are the different degrees of guilt in criminals.

A principal in the first degree is he who is the actor or absolute perpetrator of the crime.

A principal in the second degree is he who is present, aiding and abetting the act to be done. 83

An accessory is he who is not the chief actor in the offence, nor present at its performance, but in some way *concerned* therein, either before or after the fact committed.

An accessory before the fact is one who, being *absent* at the time of the crime committed, doth yet procure, counsel, or command *another* to commit a crime.

An accessory after the fact is where a person, *knowing* a felony to have been committed, receives, relieves, comforts, or assists the felon.

In all degrees of crime under felony there are no accessories; all are principals.

The several species of crime are such as offend God and his holy religion, the law of nations, the King and government, the public or commonwealth, and individuals.

Offences against God and religion are: apostacy, heresy, offences against the established church, blâsphemy, profane swearing and cursing, witchcraft, religions impostors, simony, sabbath-breaking, drunkenness, and lewdness.

Apostacy is a total renunciation of Christianity.

Heresy is an obstinate and public denial of some of the essential doctrines of Christianity.

Simony is the corrupt presentation of any one to an ecclesiastical benefice for gifts or reward.

Offences against the law of nations are principally incident to states or nations, but, when committed by private subjects, are then the objects of the municipal law.

They are: violations of safe conducts, infringement of the rights of ambassadors, and piracy.

Piracy is committing those acts of robbery and depredation on the high seas which, if committed on land, would have been felony.

Offences against the King and government are: treason, felonies injurious to the prerogative, præmunire and other misprisons, and contempts.

Treason, treachery, or breach of faith, is an offence

Thus far the penalties of praemunire have
to be kept within the proper bounds of the virgin
institutions the depriving the power of the people
they bring 20 things of no practical use could be
it has been thought fit to apply the same to the
over officers, some of which has been used to
against the duty of allegiance, and is the highest known
crime, for it aims at the very destruction of the common
wealth.

Praemunire is the offence of adhering to the temporal
power of the Pope, in derogation of the regal authority, by
introducing a foreign power into the land; in paying that
obedience to papal process and authority that constitution-
ally belongs to the King.

Misprisons and contempts are all such high of-
fences as are under the degree of capital.

Misprison of treason consists in the bare knowledge
and concealment of treason, without any degree of assent
thereto.

Offences against the public or commonwealth
are: against public justice, public peace, public trade, public
health, and public police or economy.

Offences against public justice are: embezzling
or vacating records, or falsifying proceedings in court by
personating others, etc., compelling prisoners to become
approvers, obstructing execution of legal process, escapes
from arrest, breach of prison, rescue, returning from trans-
portation, taking rewards to help one to his stolen goods,
receiving stolen goods, theft-bote, or compounding a felony,
barretry, maintenance, champerty, compounding prosecu-
tions on penal statutes, conspiracy and threats of accusation
to extort money, perjury and subornation thereof, bribery,
embracery, false verdict of jurors, negligence of public
officers, etc., oppression by magistrates, and extortion of
officers.

Embezzlement is the act of appropriating to one's
self that which is received in trust for another.

Rescue is the forcibly and knowingly freeing another
from an arrest and imprisonment.

Theft-bote, or *compounding of felony*, is the crime of
receiving back from a felon one's goods, or other amends,
upon agreement not to prosecute.

Barretry is the habitual moving, exciting, stirring up,
and maintaining suits and quarrels at law, or otherwise.

Maintenance bears a near relation to barretry, being
an officious intermeddling in a suit that in no way belongs to

statute
16 Ric II
c 5
c 1
of Praemunire

one by *maintaining* or assisting either party with money, or otherwise.

Champerty is a species of maintenance, being a bargain between two that they share the lands sued for between them if they prevail, the champertor bearing the expenses of the suit.

A Conspiracy is an agreement between two or more persons to do an unlawful act, or any of those acts which, by the *combination*, become injurious to others.

Perjury is where a person to whom a lawful oath has been administered, in some judicial proceeding, swears wilfully, absolutely, and falsely in a matter material to the issue.

Subornation of Perjury is the offence of procuring another to take such false oath as constitutes perjury in the principal.

Bribery is when a judge, or other person, takes any undue reward to influence his behavior in office.

Embracery is an attempt to corrupt or influence a jury by any means whatever, whether the jury gives a verdict or not, and whether the verdict be true or false.

Offences against the public peace are: riotous assemblies, armed or hunting in disguise, threatening or extorting by letters, destroying turnpikes, flood-gates, etc., affrays and breaches of the peace, riots, routs, and unlawful assemblies, tumultuous petitioning, forcible entry and detainer, going unusually armed, spreading false news, pretended prophesying, challenges to fight, and libels.

Disturbance is the hindering or disquieting people in their lawful enjoyment and privileges.

An affray is the fighting of two or more persons in some public place, to the terror of the people.

If it be in private, it is an *assault*.

A riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel.

A rout is where three or more meet to do an unlawful act, upon a common quarrel, and only make some *advances* toward it.

Unlawful assemblies are where three or more

assemble together to do an unlawful act, and part without doing it, or making any motion towards it.

Riots, routs, and unlawful assemblies, to constitute them, must have at least three persons.

See **Forcible entry and detainer** is violently taking, or keeping possession of, lands and tenements with menaces, force, and arms, and without the authority of law.

Offences against public trade are: owling, smuggling, fraudulent bankruptcy, usury, cheating, forestalling, regrating, engrossing, monopolies, exercising a trade not having served an apprenticeship, transporting, and enticing our artists to settle abroad.

usury **Owling**—so called from being carried on at night—is transporting wool or sheep out of the kingdom, to the detriment of its staple manufacture.

Smuggling is importing goods without paying the duties thereon.

Forestalling is buying or contracting for any merchandise or victual while on its way to market.

Regrating is buying corn, or other dead victual, and selling it again in the same market, which enhances prices.

Engrossing is buying up corn, or other dead victual, in large quantities, to sell again.

Monopolies are much the same offence in other branches of trade that *engrossing* is in provisions.

In another sense, a monopoly is where a right, before common to all, is withdrawn from the mass of the community and vested in one or more individuals, to the exclusion of all others.

Offences against the public health are: irregularities in time of plague, or of quarantine, and selling unwholesome provisions.

Offences against the public police, economy, or domestic order are: clandestine and irregular marriages, bigamy, idling and wandering of soldiers and mariners, remaining in England of outlandish persons called Egyptians or Gypsies, common nuisances, idleness, vagrancy, etc., luxury and extravagance, gaming, destroying game, etc.

Common nuisances are: annoyances in highways,

*Quarantine — 40 days probation
by ships coming from infected
countries*

bridges and rivers, offensive trades, *disorderly houses*, lotteries, fireworks, eaves-dropping, common scolds, etc.

Offences or crimes against individuals are either against their *persons*, their *habitations*, or their *property*.

Offences against the persons of individuals are: homicide or other corporal injuries.

Homicide is the taking of life, or the killing of any human creature, and it is either *justifiable*, *excusable*, or *felonious*.

The **first** has no share of guilt at all, the **second** very little, but the **third** is the highest crime against the law of nature that man is capable of committing.

Justifiable homicide is either by *command* or *permission* of law.

By command of law, as the execution of criminals.

By permission of law, viz.: **first**, for the advancement of public *justice*, as by an officer in discharge of his duty.

Second, to prevent some felony or atrocious crime, as if any person attempts to break open or burn a house in the night-time, or to rob or murder another.

Excusable homicide is by *misadventure* or in *self-defence*. *per infer
tution
to defend do*

Homicide by misadventure is where a man, doing a lawful act, without any intention of hurt, unfortunately kills another.

Homicide in self-defence is upon that principle of self-preservation whereby a man may protect himself when attacked by another, as if violently, or where there is no other means of escape except by slaying his assailant.

Chance-medley is such killing as happens in self-defence upon a sudden rencounter or affray; it is excusable rather than justifiable.

There is one species of homicide in self-defence where the party *slain* is equally innocent as he who occasioned his death, namely: in the case of two persons shipwrecked, struggling for the same plank, and one is pushed off.

Felonious homicide is the killing of a human crea-

ture without justification or excuse, which is by *killing one's self* or by *killing another*.

Int. d. o. ss.
a suicide **Killing one's self, or suicide**, is where one deliberately, or by any unlawful malicious act, puts an end to his own life.

Killing another is either *murder*, where it arises from wickedness of the heart; or *manslaughter*, where it does *not*.

Manslaughter is the unlawful killing of another without malice, either expressed or implied.

It is either *voluntary* or *involuntary*.

Voluntary manslaughter is upon a sudden heat or quarrel.

Involuntary manslaughter is perpetrated in the commission of some unlawful act.

In every case of homicide upon provocation, if there be sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, *this* is deliberate revenge, and not heat of blood, and is murder.

Excusable homicide in self-defence differs from voluntary manslaughter on a sudden provocation in that, in the one case, there is an *apparent necessity*, for self-preservation, to kill the aggressor; and in the other, no necessity at all, it being only a *sudden act of passion*.

When an involuntary killing happens while in the commission of an unlawful act, in general it will be either *murder* or *manslaughter*, according to the nature of the act which occasioned it. If in the prosecution of a *felonious* intent, or if in its *consequences* naturally tending to bloodshed, it will be murder; but if no more than a mere civil *trespass* was intended, it will only amount to manslaughter.

Murder is when a person of sound memory and discretion unlawfully killeth any reasonable creature in being and under the King's peace, with malice aforethought, either express or implied.

By *statute* in Pennsylvania, all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration or

attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the *first degree*; and all other kinds of murder shall be deemed murder of the *second degree*.

Express malice is when one, with a sedate, deliberate mind, and formed design, doth kill another.

Implied malice is where, for instance, a man wilfully poisons another, or kills another, without any, or but little, provocation.

Parricide is the murder of one's parents.

Fratricide, the murder of one's brother.

— **OTHER CORPORAL INJURIES** to the persons of individuals, not amounting to homicide, are: mayhem, abduction and marriage or defilement, seduction, fornication, adultery, rape, buggery, assault, battery, wounding, false imprisonment, and kidnapping.

Fornication is the unlawful carnal knowledge of an unmarried person with another.

When either party is married the offence, as to him or to her, is *adultery*.

Adultery, or *criminal conversation*, is the violation of conjugal fidelity.

Seduction is the corruption of women, as by illicit connection with any female of good repute, under twenty-one years of age, and under promise of marriage.

Rape is the carnal knowledge of a woman forcibly, and against her will.

Buggery is the crime against nature, committed with man or beast.

Kidnapping is the forcible stealing away of a person from his own country, and sending him into another.

Offences against the habitations of individuals are: arson and burglary.

Arson is the malicious and wilful burning of the house or out-house of another.

Burglary is the breaking and entering in the night-time the mansion house of another, with intent to commit a felony.

Offences against private property of individuals are: larceny, malicious mischief, and forgery.

Larceny is the felonious taking and carrying away of the personal goods of another.

Burglar — he that by night breaks and enters into a mansion house with intent to commit a felony.

Rape — rapts in ulsime — the carnal knowledge of a woman forcibly and against her will.

0 is of fourth thought

Simple larceny - into grand or petty larceny - when it is the stealing of goods above the value of twelve pence. Part of where of 900 to the value of twelve pence or under
126 of twelve pence. BLACKSTONE. Part of where of 900

Simple larceny, or plain theft, is unaccompanied with any other atrocious circumstances.

Mixed or **Compound larceny** includes the aggravation of a taking from one's house or person.

Distinction between grand and petty larceny **Robbery**, or open larceny from the person, is the felonious and forcible taking from the person of another goods or money of any value, by violence or putting him in fear.

Should be abolished **Malicious mischief** is the doing of mischievous damage to private property, without any intent to gain by another's loss, but out of a spirit of wanton cruelty or revenge.

every larceny **Forgery** is the fraudulent making or alteration of a writing, to the prejudice of another man's right.

whether or not the value of the property stolen, shall be deemed to be of the same nature and that by subject to the same incidents in all respects as grand larceny **The means of preventing offences** or crimes (since preventive justice is, upon every principle of reason, humanity, and sound policy) is by compelling suspected persons to give security to keep the peace, or for good behavior, and is effected by binding them in recognizance, which is an obligation with one or more securities, entered on record, and taken in some court, or by some judicial officer.

The methods of punishment include the proceedings in courts, which in criminal courts are summary or regular.

incidents in all respects as grand larceny **Summary proceedings** are such whereby a man may be convicted of divers offences, without any formal process or jury, at the discretion of the judge.

The regular proceedings in the Courts of Common Law are: arrest, commitment and bail, prosecution, process, arraignment, plea and issue, trial and conviction, clergy, judgment, reversal of judgment, reprieve or pardon, and execution.

Arrest is the apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime.

Commitment is the confinement of one's person in prison, for safe custody, by warrant from proper authority.

Bail is a security given, according to law, to insure the attendance at a future time of a party in court, and taken before a proper tribunal.

Commitment being only for safe custody, whenever bail will answer the same intention, it ought to be taken. But

in offences of a capital nature, no bail can be a security equal to the actual custody of the person. Such persons have no other sureties but the four walls of the prison. In bailable cases bail must not be refused, insufficient bail must not be taken, nor excessive bail required.

Prosecution, or the manner of accusing and prosecuting offenders, is by *presentment*, *indictment*, *information*, and *appeal*.

Presentment is the notice taken by a grand jury of any offence, from their *own* knowledge or observation, and upon which an indictment may be framed.

Indictment is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury, expressing with sufficient certainty the person, time, place, and offence.

Informations are of two kinds: those at the suit of the King and a subject, upon penal statutes—a sort of *qui tam* action, where part of the penalty goes to the informer—and those at the suit of the King or state only.

Appeal is an accusation or suit brought by one private subject against another, as for larceny, rape, mayhem, arson, homicide, etc., which the King cannot pardon, but the party injured alone can release. *must be brought within a year and a day*

An inquisition is the act of a jury, summoned by the proper officer, to enquire into a matter upon the evidence laid before them.

Process, or the means of compelling the appearance of the defendant to answer when indicted, in his absence, is, in misdemeanors, by *venire facias*, distress infinite, and *capias*; in capital crimes, by *capias* only; and in both, by outlawry.

Arraignment is the calling of the prisoner to the bar of the court, to answer the matter charged upon him in the indictment.

The plea of the prisoner, or defensive matter alleged by him in his arraignment, is either a plea to the jurisdiction, a demurrer in point of law, a plea in abatement, a special plea in bar, as a former acquittal, conviction, attain, or a pardon, or the general issue—*not guilty*.

A plea to the jurisdiction is, when an indictment

is before a court that hath no cognizance of the offence, the prisoner may except to the jurisdiction of the court by a plea to the jurisdiction without answering to the crime alleged.

A demurrer in point of law to the indictment is when the fact alleged is allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he insists that the fact as stated is no felony, etc., as alleged.

A plea in abatement is principally for a *misnomer*, or wrong name, etc.

A special plea in bar goes to the merits of the indictment, and gives a reason why the prisoner ought not to answer it at all, nor put himself upon trial for the crime alleged.

The plea of a *former acquittal* is founded on the common law maxim that no man is to be brought into jeopardy of his life or tried more than once for the same offence.

Trials for offences or crimes were formerly more numerous than at present. The different kinds were: by ordeal, either fire or water; by the *corsned*, or morsel of execration; by battle or duel, in appeals, etc.; and by *jury*.

Trial by ordeal was principally in use among our Saxon ancestors, as also that of the *corsned*; the former being the most ancient, and was of two kinds—by *fire* and *water*; that by fire being confined to persons of a higher rank.

Trial by fire ordeal was performed by taking up in the hand, unhurt, a piece of red-hot iron of two or three pounds weight, or walking, unhurt, barefoot and blindfolded, over nine red-hot plough-shares, laid at unequal distances.

By this method Queen Emma, the mother of Edward the Confessor, is said to have cleared her character, when suspected of familiarity with Alwyn, Bishop of Winchester.

Trial by water ordeal was performed either by plunging the bare arm up to the elbow in boiling water, unhurt, or casting the suspected person into a river or pond; if he floated without any action of swimming, it was deemed evidence of his guilt, but if he sunk he was acquitted.

Trial by ordeal was abolished in the reign of Henry III. (about 1250).

From kinds of special pleas in bar—former acquittal—former conviction—former attainder—or a pardon

Trial by the corsned, or morsel of execration, was by swallowing a piece of cheese or bread, about an ounce in weight, consecrated with abjuration, "I will take the sacrament upon it; may this morsel be my last," etc., desiring of the Almighty that it might cause convulsions and paleness, etc., if guilty.

Historians assure us that Goodwin, Earl of Kent, in the reign of Edward the Confessor, abjuring the death of the King's brother, at last appealed to his corsned, which stuck in his throat and killed him.

In trials by jury challenges may be made on the part of the King or that of the prisoner, and either to the whole array or the separate polls, and for the same reasons made in *civil* cases; but in *criminal* cases the prisoner is allowed to make *peremptory* challenges—that is, without showing any cause or reason.

*Reasonable
boundary
35 jurors*

Benefit of clergy was an arrest of judgment in criminal cases, and had its origin in the usurped jurisdiction of the popish ecclesiastics, in exempting clergymen or their clerks, which included every one that could read, etc., from criminal process before the secular judges in certain capital cases only. The defendant was burned with a hot iron in the brawn of his left thumb, to show that he had been admitted to this privilege, which was not allowed twice to the same person.

Judgment follows upon conviction, being the pronouncement of that punishment which is expressly ordained by law.

Judgment is reversed by *falsifying* or *reversing* the attainder or judgment, or by *reprieve* or *pardon*.

Attainder is the stain or corruption of the blood of a criminal capitally condemned; it is the immediate inseparable consequence, by the common law, on sentence of death being pronounced, or of outlawry, for a capital offence. Its *consequences* are forfeiture of property and corruption of blood, and the criminal becomes dead in law.

It differs from conviction in that it is *after* judgment, whereas conviction is *before* judgment pronounced, and may be quashed on some point of law reserved.

Attainder is falsified or reversed for matter *dehors*, or not

apparent on the face of the record, by writ of error for mistakes apparent on the face of the record, and by act of Parliament.

Outlawry when reversed, restores the party to the same plight as if he had appeared upon the *capias*.

Reprieve — *from reprendre*, to take back — is a temporary withdrawing or suspension of a sentence or judgment, whereby the execution is delayed.

It is granted by the judges where they are not satisfied with the verdict, the evidence suspicious, the indictment insufficient, where there is doubt, for time to apply for pardon, because of pregnancy, insanity, non-identity, etc.

Pardon is a permanent avoider of the judgment, by the King's mercy, drawn in due form of law, and allowed in open court, thereby making the offender a new man.

The King cannot pardon offences prosecuted by appeal, common nuisances, or offences against penal statutes, nor is his pardon pleadable to impeachment by the commons in Parliament.

Penal laws or *statutes* are those which prohibit an act, and impose a penalty for the commission of it.

Execution is, in criminal cases, the completion of human punishment.

The warrant of execution is sometimes under the hand and seal of the judge, by writ from the King, or by rule of court, but commonly by the judge's signing the calendar of prisoners, with their separate judgments in the margin.

"The student will observe that the knowledge of the law is like a deep well, out of which each man draweth according to the strength of his understanding."—*Coke*.

PLEADINGS:
INCLUDING
PARTIES TO ACTIONS
AND
FORMS OF ACTIONS.

ABRIDGED.

ANALYSIS.

Parties to actions.

In form ex contractu.

Plaintiffs.

Defendants.

In form ex delicto.

Plaintiffs.

Defendants.

Forms of action, in general, viz.: real, personal, and mixed

In form ex contractu.

Action of assumpsit.

Action of debt.

Action of covenant.

Action of detinue.

In form ex delicto.

Action on the case.

Action of trover.

Action of replevin.

Action of trespass.

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Mistake in form of action.

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Pleading in general.

The facts necessary to be stated.

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Rules for construing pleadings.

Division of pleadings.

General requisites or qualities of a plea.

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General requisites or qualities of.

Parts and particular requisites of.

Connance or cognizance of a suit.

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Defences to actions on contracts not under seal.

Pleas by several defendants.

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Parts of, viz.: commencement, body, and conclusion.

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Departure.

Rejoinder, sur-rejoinder, rebutter, etc.

Issue.

Repleaders.

Demurrers.

Defects in pleading.

Intendment.

Cured by verdict.

PLEADINGS.

PLEADING is the statement, in a logical and legal form, of the facts which constitute the plaintiff's cause of action or the defendant's ground of defence.—*Chitty*.

Pleadings are the mutual altercations between the plaintiff and defendant reduced to writing.—*Blackstone*.

Pleadings are the proceedings, from the declaration to the issue, joined.—*Wharton*.

PARTIES TO ACTIONS.

The general rule is that the action should be brought in the name of the party whose legal right has been affected, against the party who committed or caused the injury, or by or against his personal representative.

In general, courts of law do not directly recognize *mere equitable* rights, but leave them to the protection of courts of *equity*. That rule, however, prevails more strictly as regards *real property* than with respect to injuries to the *person* or *personal property*.

ACTIONS IN FORM EX CONTRACTU.—**Plaintiffs.**—In general, the action on a *contract*, whether express or implied, or whether by parol, or under seal, or of record, must be brought in the *name* of the party in whom the *legal interest* in such contract was vested, and, in general, with his *knowledge and concurrence*, or at least a sufficient indemnity

must be tendered before his name can properly be used by the party beneficially interested.

The right of action at law has been vested solely in the party having the strict *legal* title and interest, in exclusion of the mere equitable claim.

In simple contracts, or instruments *not under seal*, it seems to be a general principle that the party for whose sole benefit it is evidently made may sue thereon in his own name, although the engagement be not directly to or with him.

In the case of bills of exchange or promissory notes there is an *option* of plaintiff that might be considered an *exception* to the general peremptory rule that the right of suing can only be in *one* person or set of persons, viz.: that a party to a bill may, by arrangement between the parties, be the plaintiff, although the bill at the time be in the rightful possession of another party to the bill.

The action against a carrier for loss of goods sent by a vendor to a vendee must, in general, be brought in the name of the *latter*, and not of the consignor, because the law implies that, by the delivery to the carrier, the goods became the property of the consignee, and at his risk, subject, of course, to the unpaid vendor's right of stoppage *in transitu*.

A mere servant or agent with whom a contract is expressly made on behalf of another, and who has no direct beneficial interest in the transaction, cannot, in general, support an action thereon.

But when an *agent* has any *beneficial interest* in the performance of the contract, as for commissions, etc., or a special property or interest in the subject-matter of the agreement, he may support an action in his own name upon the contract, as in the case of a factor, broker, warehouseman, carrier, auctioneer, etc.

When the contract was made with several persons, whether it were under seal, or in writing but not under seal, or by parol, *if their legal interest were joint*, they must all, if living, join in an action, in form *ex contractu*, for the breach of it, though the covenant or contract with them was in terms joint and several.

The reason assigned why all should join is that when the interest is joint, if several were permitted to bring several actions for one and the same cause, the court would be in doubt for which of them to give judgment.

But when the legal interest and cause of action of the covenantees are several, each *may*, and *should*, sue *separately* for the particular damages resulting to him individually, although the covenant be in its terms joint.

It is improper, as well in *equity* as at *law*, for a party to be joined in a suit who has neither legal nor beneficial interest in its subject-matter.

Where a covenant is made with two or more parties to pay them money for themselves, or for the use of another, it is not correct to use the name of one only of the covenantees, although the others have omitted to execute the deed. Where joint covenantees *may* join, they must do so.

In the case of partners it is a general rule that all the members of the firm should be the plaintiffs in an action upon a contract made with the firm, nor can any private arrangement by the firm, that one only of the partners shall bring the action, give him a right to sue alone.

In the case of **dormant partners**, not privy to the contract, it seems that the other members of the firm *may omit* their names in an action.

If **tenants in common** (who hold by distinct titles) *jointly* demise premises, reserving an entire rent, they may, and perhaps should, join in an *action* to recover it; but if the rent be reserved to them separately in distinct parts, they must sue separately.

Joint tenants, unlike tenants in common, have a unity of title and interest, in respect of which they *must jointly* sue upon a contract relating to the estate, which is made by, or enures to, the benefit of all.

Parceners, for the same reason, must join in an action *ex contractu* which relates to their tenements.

The consequences of a mistake in *omitting* to join a party who ought to have been made plaintiff in an action *ex contractu*, or in *adding* a party improperly in such an action, are extremely serious.

The general rule is that the omission of proper parties as plaintiffs in cases of contract may be taken advantage of at the trial under the general issue; and if it appear on the face of the pleadings, it is fatal on demurrer, or on motion in arrest of judgment, or on error, and though the objection may not appear on the face of the pleadings, the defendant may avail himself of it, either by a *plea in abatement* or as a ground of nonsuit.

If there be a legal ground for omitting to use the name of one of several covenantees as a plaintiff, as his death, etc., it is necessary to show such excuse for the non-joinder in the declaration.

Where a party with whom a bond, simple contract, or other mere *personal* contract, was made, has assigned his interest therein to a third person, the latter cannot, in general, sue in his own name, the interest in, and remedy upon, *personal* contracts being *choses in action*, which are not in general assignable at law, so as to give the assignee a right of action in his own name, but he must proceed in that of the assignor, or, if he be dead, in the name of his personal representative.

There are instances in which, by express legislative provision, the assignee of a chose in action may sue in his own name to enforce the recovery of the demand. The operation of the bankrupt and insolvent act is to this effect.

By the custom of merchants the assignee or transferee of a bill of exchange, or check on a banker, may sue thereon in his own name.

When one or more of several obligees, covenantees, partners, or others having a *joint legal* interest in the contract, dies, the action must be brought in the name of the survivor, and the executor or administrator of the deceased must not be joined, nor can he sue separately, though the deceased alone might be entitled to the *beneficial* interest in the contract, and the executor must resort to a court of equity to obtain from the survivor the testator's share of the sum recovered; but if the interest of the covenantees were *several*, the executor of one of them may sue, though the other be living.

In the case of a mere *personal* contract, or of a *covenant not running with the land*, if it were made only with *one person*, and he be dead, the action for the breach of it must be brought in the name of his executor or administrator, in whom the legal interest in such contract is vested.

But on a covenant relating to *realty*, as for good title on a deed of conveyance, an *executor* cannot sue, even for a breach in the life-time of his testator, without showing some special damage to the *personal estate of the latter*, but the action must be brought in the name of the *heir* or *devisee*.

If an executrix or administratrix marry, she and her husband should join for the breach of any *personal* contract made with the deceased; but if she sue alone, the defendant cannot avail himself of the non-joinder except by a plea in abatement; and when a bond or other contract is made to husband and wife as executrix, he may sue alone.

When an executor dies after he has proved the will, his executor, or the executor of such executor, is the party to sue on the contract made with the original testator, provided the money to be recovered would be the assets of the representative of the original testator himself; and the same rule applies in the case of the death of an administrator of the Intestate. If the money to be recovered would be assets of the original testator, then, in case of the death of his first representative, administration *de bonis non* must be obtained, and the defendant sued accordingly.

In the case of bankruptcy the *legal* rights of the bankrupt, arising from contracts made with him, and in the performance whereof the bankrupt is beneficially interested, are, by the express provisions of the bankrupt act, transferred to, and vested in, his assignees, who may recover the same *in their own names*. There are cases, however, in which the bankrupt may sue as trustee for his creditors.

In the case of insolvency the insolvent debtor's act directs that the prisoner shall, at the time of petitioning for relief, assign all the estate and effects he is then possessed of, and all future effects which may come to him before he shall become entitled to his discharge, to the provisional assignee of the court; and that it shall be lawful for the provisional assignee to sue in his own name, *if the court*

shall so order, for the recovering, obtaining, and enforcing of any estate, debts, effects, or rights, of any such prisoner.

The effect of marriage, at least in courts of *law*, is to deprive the wife of all separate legal existence, her husband and herself being, in law, but one person.

It is, therefore, a general rule that she cannot, during the marriage, maintain an action without her husband; either upon contracts made by her before or after marriage, although they may be living apart under the provisions of a formal deed of separation, or by virtue of a divorce *a mensa et thoro* for adultery.

The exceptions are in the instance of a divorce *a vinculo matrimonii*, or where the husband is dead in law.

All chattels personal of the wife in possession are by marriage absolutely given to the husband, and for the recovery of them he may sue alone; and it is a general principle "that *that* which the husband may discharge alone, and of which he may make disposition to his own use, for the recovery of this he may sue without his wife."

As mere *choses in action* of the wife do not by the marriage vest absolutely in the husband until he reduce them in possession, and, if not reduced into possession, she would take them by survivorship. In general, he cannot sue alone, but must join his wife in all actions upon bonds and other personal contracts made with the wife *before* the marriage, whether the breach were before or during coverture; and also for rent, or any other cause of action accruing before the marriage, in respect of the real estate of the wife.

When the wife is executrix or administratrix, as her interest is in *autre droit*, the husband must, in general, join in an action.

In general, the wife cannot join in an action upon a contract made during the marriage, as for her work and labor, goods sold, or money lent by her during that time, for the husband is entitled to her earnings, and they shall not survive to her, but go to the personal representatives of the husband, and she could have no property in the money lent or the goods sold.

But when the wife can be considered as the *meritorious* cause of action, as of a bond or other contract under seal, or

a promissory note, be made to her separately, or with her husband, or if she bestow her personal labor and skill in curing a wound, etc., she may join with the husband, or he may sue alone.

Where the wife is joined in the action, in these cases, the declaration must distinctly disclose her interest, and show in what respect she is the meritorious cause of action, and there is no intendment to this effect.

For rent, or other cause of action accruing during the marriage, or a lease or demise, or other contract relating to the land or other real property of the wife, whether such contract were made before or during the coverture, the husband and wife may *join* or *he may sue alone*.

If the husband survive, there is a material distinction between chattels real and *choses in action*. The husband is entitled to the chattel real by survivorship, and to all rent etc., accruing during the coverture, and also to all chattels given to the wife during the coverture in her *own* right.

But mere *choses in action*, or contracts made with the wife before coverture, do not survive to the husband, and he must, to recover the same, sue as administrator of his wife.

If the wife survive, she is entitled to all chattels real which her husband had in her right, and which he did not dispose of in his life-time, and to arrears of *rent*, etc., which became due during the coverture, upon her antecedent demise, or upon their joint demise, during the coverture to which she assents after his death, and to all arrears of rent and other *choses in action* to which she was entitled before the covertures, and which the husband did not reduce into actual possession.

The consequences of a mistake in the proper parties, in the case of *baron and feme*, are, that when a married woman might be joined in the action with her husband, but sues alone, the objection can only be pleaded in abatement, and not in bar, though the husband might sustain a writ of error, and if she marry after writ, and before plea, her coverture must be pleaded in abatement, and cannot be given in evidence under the general issue.

But when a *feme* improperly sues alone, having no legal right of action, she will be nonsuited; and if she improperly

join in an action with her husband, who ought to sue alone, the defendant may demur, or the judgment will be arrested or reversed on a writ of error.

And if the husband sue alone when the wife ought to be joined, either in her own right or in *autre droit*, he will be nonsuited; or if the objection appear on the record, it will be fatal in arrest of judgment or on error.

DEFENDANTS.—In general, the action upon an *express* contract, whether it be by deed or merely in writing, or by parol, must be brought against *the party who made it*, either in person or by agent.

A party who expressly contracts, and permits credit to be given to him, is liable, although he were not the strict *legal owner* of the property in respect of which the contract is made, nor *beneficially* interested.

Difficulties frequently occur in deciding who should be made the defendant in an action upon a promise created or *implied by law* from a particular state of facts. **In this case it must be ascertained who is the party subject to the legal liability, for he is the person who should be sued.**

A mere equitable or moral obligation to pay a demand is, in the absence of an express promise, insufficient to support an action.

A contract made by an agent, as such, is, in law, the contract of the principal; the general rule, therefore, is that when a person has contracted in the capacity of an *agent*, and that circumstance is known at the time to the person with whom he contracts, such agent is not liable to an action for non-performance of the contract, even for a deceitful warranty, if he had authority from his principal to make the contract.

If an agent covenant under seal for the act of another, though he describe himself in the deed as contracting for, and on the part and behalf of, such another person, or if he accept or draw a bill of exchange generally and not as agent, he is personally liable, unless in the case of an agent on behalf of government.

In general, where an agent enters into a written agreement, as if he were the principal, and

the credit is given to him, he is personally liable; but this liability must be collected from the instrument upon a reasonable exposition of the whole of its terms.

Where the agent does not, at the time the contract is made, disclose that he is acting merely as an agent, and the principal is unknown, the latter may, when discovered, be sued upon the agreement.

But the principal is not liable upon the contract of his agent if the other party to the agreement, with full knowledge of the facts, and the power and means of deciding to whom he will give credit, elect to give credit to the agent only in his individual character.

At law, one partner or tenant in common cannot in general sue his copartner or co-tenant in any action in form *ex contractu*, but must proceed by action of account or by bill in equity.

It is an answer to an action that a party is *legally interested in each side of the question*. A party cannot be both plaintiff and defendant in an action. If, therefore, one of the plaintiffs be also a member of the firm against which the action is brought upon a contract entered into by the firm, the action shall fail, although the other partners only be sued.

A lunatic is liable for goods suitable to his rank, supplied to him upon a contract which a person, not aware of his infirmity, *bona fide* enters into with him.

The rule is that several persons contracting together with the same party, for one and the same act, shall be regarded as jointly, and not individually or separately, liable, in the absence of any express words to show that a distinct as well as entire liability was intended to fasten upon the promisers. This rule is more particularly obvious in the case of promises *implied* by law.

Where there are several parties, **if their contract be joint**, they must all be made defendants, although they subsequently arrange amongst themselves that one only of them shall perform the contract.

Where the covenant or promise is so framed that it does not confer upon the plaintiff a remedy against the contractors jointly, but each is only *separately* responsible for his own

act, it is essential to sue them distinctly; but where it appears upon an instrument that a promise between two contractors was *intended* to be *joint*, it may be treated as such, although the promise be *in terms* several only.

When the contract is several as well as joint, the plaintiff is at liberty to proceed against the parties jointly, or each separately, though their interest be joint. But if there be more than two parties to a joint and several contract—as where three obligors are jointly and severally bound—the plaintiff must either sue them all jointly or each of them separately.

In general, when a contract is joint and several, if the debt be considerable, it is most advisable to proceed separately, so that the creditor may thereby retain his legal remedies against each in case of death of one or more of the parties.

Courts of law, as well as equity, will not take cognizance of distinct and separate claims, or liabilities of different persons in suit, though standing in the same relative situations; therefore, in an action *ex contractu* against several, it must appear on the face of the pleadings that their contract was joint, and that fact must also be proved on the trial.

Mis-joinder is an action founded on a contract. **If too many persons be made defendants**, and the objection appear on the pleadings, either of the defendants may demur, move in arrest of judgment, or support a writ of error; and even if the objection do not appear upon the pleadings, the plaintiff may be nonsuited upon the trial if he fail in proving a joint contract.

The consequence of the joinder of too many defendants in an action founded on a *contract* are in general so important, it is advisable, in cases where it is doubtful how many parties are liable, to proceed only against those defendants who are certainly liable, in which case *non-joinder* can only be taken advantage of by a plea in abatement.

In general, in the case of a mere personal contract, the action for the breach of it cannot be brought against a person to whom the contracting party has assigned his interest, and the original party alone can be sued.

There may, however, in some cases be a *change of credit* by agreement between the parties, so as to transfer the liability from the original contracting party to another, or to one only of the original parties.

In the case of a *joint contractor*, if one of the parties die, his executor or administrator is, *at law*, discharged from liability, and the survivor alone can be sued, and if the executor be sued, he may either plead the survivorship in bar, or give it in evidence under the general issue, but in equity the executor of the deceased party is liable, unless in some instances of a surety.

If the contract were several, or joint and several, the executor of the deceased may be sued at law in a separate action, but he cannot be sued jointly with the survivor, because one is to be charged *de bonis testatoris*, and the other *de bonis propriis*.

When the contracting party is dead, his executor or administrator, or, in case of a joint contract, the executor or administrator of the survivor, is the party to be made defendant, and is liable, though not expressly named in the covenant or contract.

If the contract is under seal (or of record), the *heir* of the party contracting is liable to an action for the breach of an *express* covenant therein, provided the ancestor expressly bound himself "and his heir" by the deed or obligation, and provided the heir have *legal* assets by descent from the obligor.

When the contracting party has become bankrupt, and has obtained his certificate, he is, in general, no longer liable to be sued in respect of any debt due from him when he became bankrupt, or of any claim or demand which the creditor might have proved under the commission.

By the insolvent act an insolvent complying with the requisitions of the act is to be discharged by the court from his liabilities.

In general, a feme covert cannot be sued alone at law; and when a *feme sole*, who has entered into a contract, marries, the husband and wife must be jointly sued.

When the husband survives he is not liable to be sued in that character for any contract of the *feme*, made before coverture, unless judgment had been obtained against him and his wife before her death; if she die before judgment, the suit will abate.

But if the husband neglects, during her life, to reduce her *choses in action* into possession, the creditor may sue the person who administers thereto for debts due before her marriage, and for rent accruing during the coverture; or, for money due upon a judgment obtained against husband and wife, he may be sued alone as the survivor.

In case the wife survive she may be sued upon all her unsatisfied contracts made before coverture.

If the husband be sued alone upon the contract of his wife before coverture, and the objection appear upon the face of the declaration, the defendant may demur, move in arrest of judgment, or bring a writ of error. If the contract were mis-described as being that of the husband, the plaintiff would be nonsuited under the general issue at the trial, upon the ground of variance between the contract stated in the declaration and that proved. But if the wife be sued alone upon her contract before marriage, she must plead her coverture in abatement, or a writ of *error coram nobis* must be brought; and the coverture in such case cannot be pleaded in bar, or given in evidence upon the trial as a ground of nonsuit; and if she marry, pending an action against her, it will not abate, but the plaintiff may proceed to execution without noticing the husband. But if a *feme covert* be sued upon her supposed contract, made during coverture, she may, in general, plead the coverture in bar, or give it in evidence under the general issue, or under *non est factum*, in the case of a deed. And if the husband and wife be improperly sued jointly on a contract after marriage, the action will fail as to both.

ACTIONS IN FORM EX DELICTO.—Plaintiffs.

—The action for a tort must, in general, be brought in the name of the person whose *legal* right has been affected, and who was *legally* interested in the property at the time the injury was committed.

A *cestui que trust*, or other person having only an *equitable*

interest, cannot, in general, sue in the courts of common law against his trustee, or even a third person, unless in cases where the action is against a mere wrong-doer, and for an injury to the actual possession of the *cestui que trust*.

Many of the rules and instances which have been stated, in respect to the person to be made the plaintiff in actions in form *ex contractu*, here also govern and are applicable.

Actions in form *ex delicto* are for injuries to the *absolute* or *relative* rights of persons, or to *personal* or *real* property.

With respect to injuries to the relative rights of persons, in the case of *master and servant*, the master may sue alone for the battery of, or for debauching, his servant, although they are not related, where there is evidence to prove a consequent loss of service; and a father may sue for the seduction of his daughter, although she was married, provided some loss of service can be proved.

The wife, the child, and the servant, having no legal interest in the person or property of the husband, or parent, or master, cannot support an action for an injury to them.

The action for an injury to the absolute rights of persons, as for assaults, batteries, wounding, injuries to the health, liberty, and reputation, can only be brought in the name of the party immediately injured; and if he die, the remedy determines.

The *absolute* or *general* owner of *personal* property, having also the right of immediate possession, may, in general, support an action for any injury thereto, although he never had the actual possession.

An action for an injury to personalty may also be brought in the name of the person having only a *special* property or interest of a limited or temporary nature therein. But in this case the general rule seems to be that the party should have had the actual possession.

There are cases in which a party having the *bare possession* of goods, which is *prima facie* evidence of property, may sue a mere wrong-doer who takes or injures them, although it should appear that the plaintiff has not the strict legal title, there being no claim by the real owner, and the defendant having no right or authority from him.

The person in possession of real property cor-

poreal, whether lawfully or not, may sue for an injury committed by a stranger, or by any person who cannot establish a better title; and in trespass to land, the person actually in possession, though he be only a *cestui que trust*, should be the plaintiff, and not the trustee. But the rule is otherwise in ejectment, which is an action to try the right, and the fictitious demise must be in the name of the party legally entitled to the possession, although the beneficial interest may be in another, and according to the strict nature of the right; thus, tenants in common *cannot* join, but must *sever* in separate demises, in a declaration in ejectment.

When two or more persons are jointly entitled, or have a *joint legal interest* in the property affected, they must, in general, join in the action, or the defendant may plead in *abatement*.

Several parties cannot, in general, sue jointly for injuries to the *person*—as for slander, battery, or false imprisonment of both—but each must bring a separate action.

In actions for injuries to *personal property*, joint tenants and tenants in common must join, or the defendant may plead in abatement; but parties having several and distinct interests cannot, in general, join.

In actions for injuries to *real* property, joint tenants and parceners must join in real as well as personal actions, or the non-joinder may be pleaded in abatement.

Of the consequences of non-joinder in actions, in form *ex delicto*, which are not for the breach of a contract, the rule is that if a party who ought to be joined be omitted, the objection can only be taken by plea in abatement, or by way of apportionment of the damages on the trial, and the defendant cannot, as in actions in form *ex contractu*, give in evidence the non-joinder as a ground of nonsuit, on the plea of a general issue, or demur, or move in arrest of judgment, or support a writ of error, although it appear upon the face of the declaration or other pleading of the plaintiff that there is another party who ought to have joined.

The consequences of mis-joinder.—If *too many* persons be made coplaintiffs, the objection, if it appear on the record, may be taken advantage of, either by demurrer, in arrest of judgment, or by writ of error; or if the objec

tion do not appear on the face of the pleadings, it would be a ground of nonsuit on the trial.

We have seen that *choses in action ex contractu* are not, in general, assignable at law, so as to enable the assignee to sue in his own name; the same rule prevails in cases of injuries *ex delicto*, either to the person, or to personal or real property.

When one or more of several parties jointly interested in the property at the time the injury was committed is dead, the action should be in the name of the survivor, and the executor or administrator of the deceased cannot be joined, nor can he sue separately. But if the parties had separate interests, in respect of which they might have severed in suing, the personal representative of the deceased may maintain a separate action, provided the *tort* was not of such a nature that it died with the person.

We have seen that the right of action for the breach of a *contract* upon the *death* of either party, in general, survives to, and against, the executor and administrator of each; but in the case of *torts*, when the action must be in form *ex delicto*, for the recovery of damages, and the plea not guilty, the rule at common law was otherwise, it being a maxim that *actio personalis moritur cum persona*. By statute this rule has been altered in relation to *personal property*, and in favor of the personal representative of the *party injured*; but if the action can be framed in form *ex contractu*, this rule does not apply.

In the case of injuries to the person, whether by assault, battery, false imprisonment, slander, or otherwise, if either party who received or committed the injury die, no action can be supported, either by or against the executors or other personal representatives.

So, also, with respect to injuries to *real property*, if either party die, no action in form *ex delicto* could be supported either by or against his personal representatives. But statutes have introduced a material alteration in the common law doctrine, as well *in favor* of executors and administrators of the party injured as *against* the personal representatives of the party injured, but respects only injuries to

personal and real property, and subject to certain *restrictions* as regards the commencement of an action for such injury within a *short time after the death*, and declaring that the damages to be recovered from an executor or administrator shall be ranked or classed with *simple contract debts*.

In case of bankruptcy, when the injury consists in the unlawful detention of any part of the bankrupt's *real or personal property*, the assignees may bring actions for the purpose of recovering the possession of value thereof, but for mere *personal torts* to the *bankrupt* no right of action passes to the assignee.

In case of insolvency the rules upon this subject appear to be analogous to those in case of bankruptcy.

In the case of marriage the wife, having no legal interest in the person or property of her husband, cannot, in general, join with him in any action for an injury to them, except in an action for a joint malicious prosecution of both, in which they may join in respect of an injury to both, or the husband may sue alone for the injury to himself and expenses of defence.

For injuries to the person, or to the personal or real property of the wife, committed *before* the marriage, when the cause of action would survive to the wife, she *must* join in the action, and if she die before judgment therein, it will abate.

But in detinue to recover personal chattels of the wife, in the possession of the defendant before the marriage, perhaps the husband must sue alone, because the law transfers the property to him.

When an injury is committed to the *person* of the wife *during coverture*, the wife cannot sue alone in any case; and the husband and wife *must* join if the action be brought for the personal suffering or injury to the wife, and in such case the declaration ought to conclude to their damage, and not that of the husband alone, for the damages will survive to the wife if the husband die before they are recovered.

With respect to personal property, when the cause of action had only its inception before the marriage, but its completion afterwards, as in case of trover before marriage and conversion during it, or of rent due before

marriage and a rescue afterwards, the husband and wife may join, or they may sever in trover and trespass. In detinue it seems the husband should sue alone.

When the cause of action has its inception, as well as completion, after marriage, the husband must sue alone.

In real actions for the recovery of the land of the wife, and in a writ of waste thereto, the husband and wife must join but for damages or a tort the husband may sue alone.

If the husband survive, he may maintain an action of trespass, etc., for any injury in regard to the person or property of the wife for which he might have sued alone during the coverture.

If the wife survive, any action for a *tort* committed to her personally, or to her goods or real property before marriage, or to her personal or real property during coverture, will survive to her.

The consequences of a mistake in the proper parties in the case of husband and wife seem to be nearly the same in actions in form *ex delicto* as in those *ex contractu*.

DEFENDANTS.—In *personal* or *mixed* actions, in form *ex delicto*, the person committing the injury, either by himself or his agent, is, in general, to be made the defendant, but *real* actions can only be supported against the claimant of the freehold.

The general rule is that all persons are liable to be sued for their own tortious acts, unconnected with, or in disaffirmance of, a contract.

It is a clear general rule that *corporations* are liable to be sued as such in case or trover for any *torts* they may cause to be committed, and corporations and incorporated companies may be sued in that character for damages arising from the breach by them of a duty imposed by law.

An action cannot be maintained against a judge or justice of the peace, acting *judicially* in a matter within the scope of his jurisdiction, although he may decide erroneously; nor against a juryman, attorney general, or a superior military or naval officer, for an act done in the execution of their respective offices.

With regard to joint tenants and tenants in common of realty, the general rule appears to be that

ejectment will lie by one against the other only in the case of an *actual* ouster; and after a recovery in such action trespass for mesne profits may be brought. So, trespass will lie where there has been a total destruction of the subject-matter of the tenancy in common.

With respect to a tenancy in common of a chattel, the rule is that one tenant in common cannot sue his co-tenant if he merely take the chattel away, for, in law, the possession of one is the possession of both, and each has equally a right to take and retain such possession. But if one of the tenants in common destroy, misuse, or spoil the chattel, the other may maintain an action at law.

If a *third* person collude with one partner in a firm to injure the other partners in their joint trade, the latter may maintain a joint action against the person so colluding.

All persons who direct or order the commission of a trespass, or the conversion of personal property, or assist upon the occasion, are, in general, liable *as principals*, though not benefited by the act.

On principles of public policy a *sheriff* is liable *civilly* for the tortious acts of his under-sheriff in the course of the execution of their duties.

The distinctions with regard to the liabilities of the owners of *animals* are important, particularly as they affect the form of the action.

The owner of domestic or other animals not naturally inclined to commit mischief, as dogs, horses, oxen, etc., is not liable for any injury committed by them to the person or personal property unless it can be shown that he had previous notice of the animal's mischievous propensities, or that the injury was attributable to some other neglect on his part; and though notice can be proved, the action must be *case*, and not *trespass*.

The liability to an action in respect of *real* property may be for misfeasance, or malfeasance, or for nonfeasance. In these cases the action should, in general, be against the party who did the act complained of, or against the occupier, and not against the owner, if the premises were in possession of his tenant, unless he be covenanted to repair.

An agent or servant, though acting *bona fide* under

the directions and for the benefit of his employer, is personally liable to third persons for any tort or trespass he may commit in the execution of the orders he has received.

An Attorney, acting *bona fide* and professionally, may not be personally liable in cases where he does not exceed the line of his duty.

It is an established rule that an action does not lie against a steward, manager, or agent, for damage done by the negligence of those employed by him in the service of his principal, but the principal, or those actually employed, alone can be sued.

There are some torts which, in legal consideration, may be committed by several, and for which a joint action may be supported against all the parties. Thus a *joint* action may be brought against several for a malicious prosecution, assault and battery, publishing a libel, etc.; but if in legal consideration the act complained of *could not have been committed by several persons*, and can only be considered the tort of the actual aggressor, or the distinct tort of each, a separate action against the actual wrong-doer only, or against each, must be brought. Therefore, a joint action cannot be supported against two for verbal slander, etc.

The consequences of mis-joinder or non-joinder.—If several persons be made defendants jointly where the tort *could not*, in point of law, be joint, they may demur, and, if verdict be taken against all, the judgment may be arrested or reversed on a writ of error; but the objection may be aided by the plaintiffs taking a verdict against only one; or, if several damages be assessed against each, by entering a *nolle prosequi* as to one after verdict and before judgment.

In other cases where, in point of fact and of law, several persons *might have been jointly guilty of the same offence*, the joinder of more persons than were liable in a personal or mixed action in *form ex delicto* constitutes no objection to a partial recovery, and one of them may be acquitted and a verdict taken against the others.

On the other hand, if several persons jointly commit a tort, the plaintiff, in general, has his election to sue all or

some of the parties jointly, or one of them separately, because a *tort is, in its nature, a separate act* of each individual.

In actions in form *ex delicto*, against one only, for a tort committed by several, he cannot plead the non-joinder of the others in abatement or bar, or give it in evidence under the general issue; for a plea in abatement can only be adopted in those cases where regularly all the parties *must* be joined, and not where the plaintiff *may* join them all, or not, at his election.

This rule applies only in actions for torts strictly unconnected with contract.

A recovery against one of several parties who *jointly* committed a tort precludes the plaintiff from proceeding against any other party not included in such action.

As in the case of a breach of a covenant, so in that of torts, the *assignee* of the estate is not liable for an injury resulting from any nuisance or wrongful act committed thereon before he came to the estate; but if he *continue* the nuisance he may be sued for such continuance.

At common law, upon the death of the wrong-doer, the remedy for torts unconnected with contracts, in general, determines; and, until statutory provision, no action could be supported against the executor or administrator of the party who committed the injury. Many of the preceding observations on the rule *actio personalis moritur cum persona*, in its relation to the death of *plaintiffs*, are equally applicable to the case of the death of the wrong-doer.

For injuries to the person, if the wrong-doer die before judgment, the remedy determines, and there is no instance of an action having been supported for such injuries against his personal representatives.

In general, also, no action in form *ex delicto* could, before statutory provision, be supported against an executor for an injury to *personal property* committed by his testator.

For injuries to *real property* no action in form *ex delicto* could, in general, be supported against the personal representatives of the wrong-doer, but a court of equity will frequently afford relief against the executor of the wrong-doer.

The bankrupt act does not contain any provision enabling a person injured by any personal tort, committed by the bankrupt before his bankruptcy, to obtain remuneration from the funds of the bankrupt, which become vested in the assignees for the benefit of the creditors.

The same rule holds in the case of an insolvent as in the instance of a bankrupt with regard to a claim for *damage* for a *tort* committed by the insolvent.

In case of marriage, action for torts committed by a woman before her marriage must be brought against the husband and wife jointly. So, also, for torts committed by the wife *during* coverture. But the plaintiff cannot, in the same action, proceed also for slander or other tort committed by the husband alone; nor can the husband and wife be sued jointly for slander by both.

The consequences of mistake, in the cases of *baron* and *feme*, are, if the wife be sued alone for her tort before or after marriage, she must plead her coverture in abatement, and cannot otherwise take advantage of it; but if the husband and wife be sued jointly for torts of which they could not in law be jointly guilty, as for slander by both, if the objection appear on the face of the declaration the defendant may demur, move in arrest of judgment, or support a writ of error.

FORMS OF ACTIONS.

It is no longer necessary, as formerly, to state the whole cause of action and form of complaint **in the writ**, yet it is still necessary for the practitioner to decide on the proper *form of action* to be adopted, and to state it, though very concisely, in the writ, and which form of action must afterwards be adhered to in the declaration, or the latter will be set aside for irregularity.

Actions are, from their subject-matter, distinguished into *real*, *personal*, and *mixed*.

Real actions are for the specific recovery of real property only, and in which the plaintiff, then called the defendant, claims title to lands, tenements, or

hereditaments, in fee-simple, fee-tail, or term for life—such as writs of right, formedon, dower, etc.

Personal actions are for the recovery of a debt or damages, for the breach of a contract, or a specific personal chattel, or a satisfaction in damages for some injury to the personal or real property.

Mixed actions partake of the nature of the other two, the plaintiff proceeding for the specific recovery of some real property, and also for damages for an injury thereto.

Personal actions are in form *ex contractu*—in other words, for breach of contract; or, *ex delicto*, for wrongs unconnected with contract.

Actions ex contractu, or upon contracts, are principally: *assumpsit*, *debt*, *covenant*, and *detinue*.

Actions ex delicto, or for wrongs or torts, are: *case*, *trover*, *replevin*, and *trespass vi et armis*.

ACTIONS IN FORM EX CONTRACTU.—**Assumpsit** is an action for the recovery of damages for the non-performance of a parol or simple contract; or, in other words, a contract not under seal, nor of record. It is not sustainable, however, unless there has been an *express contract*, or unless the law will imply a contract.

It is not judicious to adopt this form of action where the plaintiff may declare in tort in cases where, by suing *ex contractu*, the right of set-off may attach.

The general issue or most general plea in this action is *non-assumpsit*.

Debt is an action so called because it is a legal consideration for the recovery of a debt *eo nomine* and in numero, and though damages are in general awarded for the detention of the debt, in most instances they are merely nominal.

It is a more extensive remedy for the recovery of money than assumpsit or covenant, for *assumpsit* is not sustainable upon a specialty, and *covenant* does not lie upon a contract not under seal; whereas *debt* lies to recover money due upon legal liabilities, or upon

simple contracts, express or implied, written or verbal, and upon contracts under seal or of record, on statutes by a party grieved, or by common informer, and **whenever the demand is for a sum certain, or capable of being reduced to a certainty.**

Though debt lies, as a general rule, for a sum certain, yet it is the proper remedy for a penalty imposed by statute, though the amount is uncertain, and is to be fixed by the court between certain sums.

The action of debt cannot be supported for a debt payable by instalments till the whole of them be due, though for rent payable quarterly or otherwise, or for an annuity, or on stipulation to pay a certain amount on one day and a certain amount on another, debt lies on each default, and even where one sum is payable by instalments, if the payment be secured by a penalty, debt is sustainable for such penalty.

Formerly the *plea* of the general issue in this action was *nil debet*. But now, the actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant pleads "that he *never was* indebted in manner and form as in the declaration alleged," etc.; in debt on specialty, the plea denying the execution of the deed set out in the declaration is *non est factum*; and to debt on record, *nul tiel record*.

Covenant is an action and remedy provided by law for the recovery of damages for the breach of a covenant, or contract under seal.

Covenant and debt are concurrent remedies for the recovery of any *money* demand where there is an express or implied contract in an instrument under seal to pay it; but, in general, debt is the preferable remedy, as in that form of action the judgment is final in the first instance if the defendant do not plead.

Covenant is the *peculiar* remedy for the non-performance of a contract made under seal where the damages are unliquidated and depend in amount on the opinion of the jury, in which case neither debt nor *assumpsit* can be supported.

The usual plea in this action is *performance with leave*, etc.

Detinue is the action, and only remedy by

suit at law, for the recovery of a personal chattel in specie, except in those instances where the party can obtain possession by replevying the same, and by action of replevin.

This action is somewhat peculiar in its nature, and it may be difficult to decide whether it should be classed amongst forms of action *ex contractu*, or should be ranked with actions *ex delicto*.

The right to join detinue with debt, and to sue in detinue for not delivering goods in pursuance of the terms of a bailment to the defendant, seem to afford ground for considering it rather as an action *ex contractu* than an action of tort.

On the other hand, it seems that detinue lies, although the defendant wrongfully became the possessor thereof in the first instance, without any relation to any contract.

This action is only sustainable for the recovery of a specific chattel, and not for real property. The goods for which it is brought must be distinguishable from other property, and their identity ascertainable by some certain means, so that, if the plaintiff recover, the sheriff may be able to deliver the goods to him.

It seems to be a general rule that the plaintiff must have a general or special property in the goods *at the time the action was commenced* in order to maintain detinue.

The gist or main point of this action is the wrongful detainer, and not the original taking.

In pleading it is usual to state that the defendant acquired the goods by *finding*, except where he is declared against as a bailee; yet that allegation is not traversable, and it was observed in a case that, if detinue could not be supported because the original case was tortious, a person might be greatly injured and have no adequate remedy; for in trover damages only can be recovered, and the thing detained may be of such a description that a judgment merely for damages would be an inadequate satisfaction.

With respect to the *pleadings* in this action, *more certainty* is necessary in the *description* of the chattels than in an action of trover or replevin.

The plea of the general issue in this action is *non detinet*.

This action is now not much used, having given place to that of trover in practice.

ACTIONS IN FORM EX DELICTO.—Personal actions in form *ex delicto*, and which are principally for the redress of wrongs unconnected with contract, are: case, trover, replevin, and trespass *vi et armis*.

Mixed actions are: ejectment, waste, etc.

If the injury be *forcible*, and occasioned *immediately* by the act of the defendant, trespass *vi et armis* is the proper remedy; but if the injury be not in legal contemplation *forcible*, or *not direct* and *immediate* on the act done, but only *consequential*, then the remedy is by *action on the case*.

Injuries ex delicto are, in legal consideration, committed *with force*, as assaults, batteries, etc., or *without force*, as slander, etc. They are also either *immediate* and *direct*, or *mediate* and *consequential*.

Force is, in legal consideration, either *implied* by law or *actual*; force is implied in every trespass, *quare clausum fregit*.

The distinction is material; an injury is considered *immediate* when the act complained of *itself*, and not merely a consequence of that act, occasions the injury.

But where the damage or injury ensued not directly from the act complained of, it is termed *consequential* or *mediate*, and cannot amount to a *trespass*.

Where the act occasioning an injury is unlawful, the intent of the wrong-doer is immaterial.

It is a general rule that if a party be in the prosecution of a legal act **an action does not lie for an injury resulting from an inevitable or unavoidable accident** which occurs without *any* blame or default on his part.

Action on the case lies, generally, to recover damages for torts not committed with force, actual or implied; or, having been occasioned by force, where the matter affected was not tangible, or the injury was not immediate, but consequential, in which cases trespass is not sustainable.

Case is the proper remedy for an injury to the *absolute rights of persons*—not immediate, but consequential; also for

injuries to the *relative* rights of persons, except where really committed with force, when *trespass* is the proper remedy.

For injuries to personal property, not committed with force, or not immediate, or where the plaintiff's right thereto is in reversion, *case* is also the proper remedy.

Where there is an express promise, and a legal obligation results from it, then the plaintiff's cause of action is most accurately described in *assumpsit*, in which the promise is stated as the gist of the action.

But where, from a given state of facts, the law raises a legal obligation and a consequential damage, there, although *assumpsit* may be maintainable upon a promise implied by law to do the act, still **an action on the case, founded in tort**, is the more proper form of action, in which the plaintiff, in his declaration, states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and damage resulting from that breach.

Where injuries to *real property corporeal* are immediate, and committed on the land, etc., in the possession of the plaintiff, the remedy is trespass; but where the injury is not immediate, but consequential, or where the plaintiff's property is only in reversion, and not in possession, the action should be in case.

The *plea* in this action is principally the general issue, *not guilty*.

Action of trover, or *conversion*, was, in its origin, an action of trespass on the case for the recovery of damages against a person who had *found* goods and refused to deliver them, on demand, to the owner, but *converted* them to his own use, from which word, *finding* (trover), the remedy is called an action of trover.

The injury lies in the conversion and deprivation of the plaintiff's property, which is the *gist* of the action, which action is for the recovery of *damages* to the extent of the value of the thing converted.

The object and result of the suit are not the recovery of the thing itself, which can only be recovered by action of detinue or replevin.

Lord Mansfield thus defines this action: "In *form* it (i. e., the trover) is a fiction; in *substance* it is a remedy to recover

the value of personal chattels wrongfully converted by another to his own use.”

The action is confined to the conversion of goods or personal chattels.

To support this action the plaintiff must, at the time of the conversion, have had a complete *property*, either *general* or *special* in the chattel, and also *actual possession*, or the *right* to the *immediate possession* of it.

In the case of a conversion by wrongfully taking, it is not necessary to prove a demand and refusal; proof of the wrongful act is sufficient to establish the conversion, but a demand and refusal are necessary in *some cases*, as where the defendant became, in the first instance, lawfully possessed of the goods, etc.

For a wrongful taking of goods trover is, in general, a concurrent remedy with trespass; but the converse does not hold, for trover may often be brought where trespass cannot.

The general issue in this action is, *not guilty*.

Action of replevin is that whereby the owner of goods, unjustly taken and detained from him, may regain possession thereof through the medium of, and upon application to, the sheriff, upon giving him security to prosecute an action against the person who seized. It is principally used in cases of distress, but it seems that it may be brought in any case where the owner has goods taken from him by another.

This action is of two sorts: in the **detinet**, where goods are still detained by the person who took them, to recover the value and damages; and in the **detinuit**, for the recovery of *damages* only, for the taking of the goods, and for the detention till the time of the replevy, and not the value of the goods themselves. The former is now obsolete.

Replevin can only be supported for taking personal chattels, and not for taking things attached to the freehold, and which are, in law, considered fixtures, and cannot be delivered to the distrainor upon a writ of *retorno habendo*.

To support replevin the plaintiff must, at the time of the caption, have had either the general property in the goods taken or a special property therein.

If the plaintiff has not the immediate right of possession, replevin cannot be supported, but the party must proceed by an action on the case.

In order to maintain replevin the plaintiff must prove either a tortious taking, or a tortious detention of the property replevied.

The general issue in this action is *non-cepit*, but under this the defendant cannot dispute the plaintiff's property, which must be denied by a special plea.

Action of trespass only lies for injuries committed with force, and, generally, only for such as are *immediate*, and the intention of the wrong-doer is, in general, immaterial in this action.

The term trespass, in its most extensive signification, includes every description of *wrong*, on which account an action on the case has been usually called "trespass on the case," but technically it signifies an injury committed *vi et armis*.

The difference between an action of *trespass* and an action on the case is that in the former the plaintiff complains of an immediate wrong, and in the latter of a wrong that is the consequence of another act.

The gist of this action is the injury to the possession, and the general rule is that unless at the time the injury was committed the plaintiff was in actual possession, trespass cannot be supported, and though the title may come in question, yet it is not essential to the action that it should.

Actual and exclusive possession without a legal title is sufficient against a wrong-doer, or a person who cannot make out a title, *prima facie* entitling him to the possession, or show any right or authority from the real owner.

No action will lie against a judge for what he does *judicially*, though it were done maliciously; at least he would not be liable in trespass in such case. But when an inferior court is guilty of an *excess* of jurisdiction, or has no *jurisdiction* over the subject-matter, *trespass* may be supported for anything done under such proceeding.

The want of jurisdiction in a court rendering a judgment renders the judgment *coram non judice* and void, and the

magistrate and all others concerned in enforcing the judgment would be trespassers.

The general issue in this action is, *not guilty*.

Action of ejectment lies for the recovery of the possession of *real* property, in which the lessor of the plaintiff has the *legal interest* and a *possessory right*, not barred by the statute of limitation. It is not a *real* action, nor a mere *personal* action, but is what is termed a *mixed* action, partly for the recovery of the thing or property itself, and partly to recover damages, which, in general, are merely nominal, but in some cases between landlord and tenant such damages are, in effect, the full amount of the *mesne profits* up to the time of trial.

Ejectment is an action founded in fiction, being brought in the name of a nominal plaintiff, whose supposed right to the possession is founded on a supposed demise made to him by the party or parties really entitled to the possession of the property.

The action cannot be commenced until the real plaintiff's *right of entry* has accrued.

Mere nominal damages and costs only being recoverable in this action, in order to complete the remedy for damages when the possession has been long detained, an action of trespass for the *mesne profits* must, in general, be brought after the recovery in ejectment.

With respect to the title, a party having a right of entry, whether his title be in fee simple, fee-tail, or in copyhold, or for life, or years, may support an action of ejectment; but the right of possession must be of some duration and exclusive; hence it cannot be supported where a party has merely a license to use land, or for a standing place, etc.

The general rule governing this action is that the lessor of the plaintiff must recover upon the *strength of his own title*, and, of course, he cannot in general found his claim upon the insufficiency of the defendant's, for possession gives the defendant a right against every person who cannot show a sufficient and better title, and the party who would change the possession must, therefore, first establish a legal title.

This action is only sustainable for what, in

fact, or in point of law, amounted to an ouster or dispossession of the lessor of the plaintiff. But such *ouster* may, and usually is, by merely *holding over*; and an immediate tenant may be sued for the holding over by his under-tenant, though against his will.

If a tenant under-let, and at the end of his term his sub-tenant refuse to quit, the original lessor may support ejectment against *both*, and both are liable to pay mesne profits.

Action for mesne profit is, in *form*, an action of trespass *vi et armis*, but, in *effect*, to recover the rents and profits of an estate as a satisfaction to the real plaintiff for the injury he has sustained by being kept out of possession, and the mesne profits, which, in general, not being included in the verdict in the ejectment, the law has provided this remedy for that injury; the action of ejectment, as at present conducted, though nominally a *mixed* action, being altogether a mere fiction, it being brought by a *nominal* plaintiff against a *nominal* defendant for a *supposed* ouster, merely *nominal* damages are given.

In general, any person found in possession, after a recovery in ejectment, is liable to the action; and it is no defence that he was on the premises merely as an agent, and under the license of the defendant in ejectment, for no man can license another to do an illegal act; but, generally, the person against whom the judgment in ejectment has been given ought to be made the defendant in this action.

Mistake in the form of action.—When the objection to the *form* of the action is substantial, and appears *upon the face of the declaration*, without regard to *extrinsic facts*, it may be taken advantage of by demurrer, or by motion in arrest of judgment, or by writ of error.

When the objection to the form of action *does not appear on the face of the pleadings*, it can only be taken as a ground of nonsuit, in which case the defendant will be entitled to his costs.

If by either of these means the plaintiff fail in his action, and judgment be given against him for that reason, and not upon the merits, he is at liberty to commence a fresh action,

and the defendant cannot plead in bar the proceedings in the first ineffectual suit.

Joinder of actions.—Where the plaintiff has two *causes of action*, which may be joined in one action, he ought to bring one action only, and if he commence two actions, he may be compelled to consolidate them and to pay the costs of the application.

The joinder in action often depends on the form of the action, rather than on the *subject-matter* or *cause of action*; thus, in an action against a carrier for the loss of goods, if the plaintiff declare in *assumpsit* he cannot join a count in *trover*, as he may if he declare against him in case, for the joinder depends on the *form* of the action.

When the *same plea* may be pleaded, and the *same judgment* given on all the counts of the declaration, or whenever the *counts* are of the *same nature*, and the *same judgment* is to be given on them all, though the pleas be different, as in the case of debt upon bond and on simple contract, they may be joined. Perhaps the latter—that is, the *nature* of the cause of action—is the best test or criterion by which to decide as to the joinder of counts. By this rule we may decide, in general, what forms of action may be joined in the same declaration.

It is a general rule that actions in form ex contractu cannot be joined with those in form ex delicto.

A person cannot in the same action join a demand *in his own right* and a demand as *representative* of another, or *autre droit*, nor demands against a person on his *own liability* and on his liability in his *representative capacity*.

Election of actions.—The party injured frequently has an election of several remedies for the same injury. and the due exercise of this election being of great importance, it may be useful to state the principal points which direct the choice of several remedies.

A strict legal title is essential to the support of some remedies, but in others the plaintiff's bare possession of the property affected is sufficient. Where the title of the plaintiff may be doubtful, it is, in general, advisable to adopt the latter description of remedy.

Of bail and process in actions in form *ex delicto*.—In *case*, *trover*, *detinue*, and *trespass* the defendant cannot be arrested without a special order of the court or judge, and it is not usual to grant such order except where there has been an outrageous battery, or the defendant is about to quit the kingdom; therefore, in cases where it may be material to have the security of *bail*, the action should, if possible, be framed in *assumpsit* for money had and received, etc. Where, however, the defendant has been already arrested, the form of action must correspond with the affidavit, to hold to bail, and the form of action stated in the *capias* or other process.

The number of parties.—We have seen that in an action in form *ex contractu*, if a person who ought to be made *co-plaintiff* be omitted, it is a ground of nonsuit, etc., except in the case of executors and administrators, whereas in actions in forms *ex delicto* the non-joinder of a party who should have been a *co-plaintiff* can only be pleaded in abatement; hence the latter form of action is preferable, if it can be adopted, where there is reason to doubt who should be joined as a plaintiff.

Number of the causes in action.—Where the plaintiff has several demands of a similar kind, recoverable in different forms of action, he frequently may, and then he ought to, proceed for the whole in that form of action which will embrace his various claims.

Of the defence.—By a judicious choice of the remedy the defendant may be frequently precluded from availing himself of a defence which he might otherwise establish.

The venue.—In some cases there may be two or more actions in effect for the same injury, the one *local* and the other *transitory*; consequently the latter form of action should be adopted where it may be advisable to try the cause out of the county where the estate is situated.

As to the evidence, it is frequently more convenient that the action should be *trespass* than *case*, because, if laid in *trespass*, no nice points can arise upon the evidence by which the plaintiff may be defeated upon the form of the action, as there may, in many instances, if *case* be brought. Very often the form of action, by driving the

defendant to plead more specially, may narrow the plaintiff's evidence.

Of costs.—In actions in form *ex contractu* the plaintiff is, in general, entitled to *full costs*.

The judgment and execution.—The action of debt is frequently preferable to *assumpsit* or covenant, because the judgment in debt by *nil dicit*, etc., is, in general, final, and execution may be issued immediately without the expense and delay of a writ of enquiry. Replevin or detinue is preferable to trover when it is important to obtain the goods themselves.

The circumstance of a party having elected one of several remedies by *action* will not, in general, preclude him from abandoning such suit, and, after having duly discontinued it, he may adopt any other remedy.

The plaintiff cannot, in general, bring a fresh species of action for the same cause whilst the former is depending, or after it has been determined by a verdict.

PLEADING IN GENERAL.

Pleading is the statement in a logical and *legal form* of the *facts* which constitute the plaintiff's cause of action or the defendant's ground of defence.

The grand object contemplated by the system is the production of a certain and material issue between the parties upon some important part of the subject-matter of dispute between them.

THE FACTS NECESSARY TO BE STATED.—In general, whatever circumstances are necessary to constitute the cause of complaint, or the ground of defence, must be stated in the pleadings, and all beyond is surplusage; *facts* only are to be stated, and not arguments or inferences, or matters of law; in which respect the pleadings at law differ materially from those in equity.

There are *some facts* of such a *public* or *general* nature that the courts *ex officio* take notice of them, and which, consequently, ought not to be unnecessarily stated in pleading; such are public matters relating to the King and to Parlia-

ment, public statutes and the facts which they recite, ecclesiastical, civil, and marine laws, common law rights and duties, and general customs; days of the week, etc., on which particular days fall, the divisions of the country into counties, etc., the meaning of English words and terms of art according to their ordinary acceptation, of their own course of proceedings, the privileges they confer on their officers, etc.

Where the law presumes a fact, or it is necessarily implied, it need not be stated.

Where the law presumes the affirmative of any fact, the negative of such fact must be proved by the party averring it in pleading.

Illegality in a transaction is never presumed; on the contrary, everything is presumed to have been legally done till the contrary is proved.

It is a general rule of pleading that **matter which should come more properly from the other side need not be stated**—i. e., it is enough for each party to make out his own case or defence.

Although any particular fact may be the gist of a party's case, and the statement of it indispensable, it is still a most important principle of the law of pleading that, in alleging the fact, it is unnecessary to state such circumstances as *merely tend to prove the truth* of it. **The dry allegation of the fact, without detailing a variety of minute circumstances which constitute the evidence of it, will suffice.**

The object of the pleadings is to arrive at a specific issue upon a given and material fact, and this is attained, although the *evidence* of such fact to be laid before the jury be not specifically developed in the pleading.

Though the general rule is that facts only are to be stated, yet there are some instances in which the statement in the pleading is valid, though it does not accord with the real facts, **the law allowing a fiction**, as in the action of ejectment, in which the statement of the demise to the nominal plaintiff is fictitious. So in trover and detinue, the usual allegation that the defendant *found* the goods rarely accords with the fact, and where the number, quan

tity, species, or value of a thing, need not be proved precisely as laid, it is usual to state a greater number than really was the case in order to admit of greater latitude in evidence; but except in these and a few other well-known instances, established and recognized in pleading for the convenience of justice, the pleading matter known to the party to be untrue is censurable.

The rule relating to duplicity or doubleness tends more than any other to the production of a *single* issue upon the *same* subject-matter of dispute—the real object of the science of pleading. It precludes both parties from stating or relying upon more than one *matter* constituting a sufficient ground of action in respect to the same demand, or a sufficient defence to the same claim, or an adequate answer to the precedent pleading of the opponent.

The plaintiff cannot, by the common law rule, in order to sustain a single demand, rely upon two or more distinct grounds or matters, each of which, independently of the other, amounts to a good cause of action in respect of such demand. And the same count must not contain two promises in respect to the same subject-matter.

The defendant could not, in answer to a single claim, rely on several distinct answers, nor can he now do so in one plan.

At common law the declaration may comprise several counts upon different distinct demands of the same nature, or distinct counts upon the same claim.

And several distinct facts or allegations, however numerous, may be comprised in the same plea, or other pleading, without amounting to the fault of duplicity, if one fact, or some of the facts, be but dependent upon, or be mere inducement or introduction to, the others, or if the different facts form together but one connected proposition, or entire matter or point.

To avoid any unnecessary statement of facts, as well as prolixity in the statement of those which may be necessary, is of the greatest importance in pleading, as the statement of immaterial or irrelevant matter or allegations is not only censurable as creating unnecessary expense, but also frequently affords an advantage to the

opposite party, either by affording him matter of objection on the ground of variance, or as rendering it incumbent on the party pleading to adduce more evidence than would otherwise have been necessary.

If the matter unnecessarily stated be wholly foreign and irrelevant to the cause, so that no allegation whatever on the subject was necessary, it will be rejected as surplusage, and it need not be proved; nor will it vitiate even on a special demurrer, it being a maxim that *utile per inutile non vitiatur*.

But if the very ground of the action be misstated, that will be fatal, for then the case declared on is different from that which is proved, and the plaintiff must recover *secundum allegata et probata*.

The introduction of unnecessary words of form will not vitiate the rest of a replication which is good.

Surplusage is never assignable as cause of demurrer; but surplusage, in tendering an *issue* or in *other part of pleading*, tending to embarrass the opponent, may be assigned specially as cause of demurrer.

The general rule is that a pleading inconsistent with itself, or repugnant, is objectionable.

Mode of stating facts.—The principal rule is that they must be set forth with *certainty*.

Less certainty is requisite when the law presumes that the knowledge of the facts is more *properly* or *peculiarly* in the opposite party.

Where a subject comprehends multiplicity of matter and a great variety of facts, there, in order to avoid prolixity, **the law allows general pleading.**

In general, *pleadings* must not be insensible or repugnant, nor ambiguous or doubtful in meaning; not argumentative, nor in the alternative.

Rules for construing pleadings.—It is a maxim that everything shall be taken most strongly against the party pleading where the meaning of the words is equivocal.

But the maxim must be received with this qualification: that the language of the pleading is to have a reasonable *intendment* and construction, and where an expression is

capable of different meanings, that shall be taken which will *support* the declaration.

The division of pleadings, or the *parts* of pleadings, are arrangeable under two heads: the *regular parts* being those which occur in the ordinary course of a suit, and the *irregular* or *collateral parts* being those which are occasioned by mistakes in the pleadings on either side.

The regular parts of pleading are: first, the *declaration*, or count; second, the *plea*; third, the *replication*; fourth, the *rejoinder*; fifth, the *sur-rejoinder*; sixth, the *rebutter*; seventh, the *sur-rebutter*; eighth, *pleas puis d'arien continuance*, where the matter of defence arises *pending* the suit.

The irregular or collateral parts of pleading are: first, *demurrers* to any part of the pleadings above mentioned; second, *demurrers to evidence* given at trials; third, *bills of exception*; fourth, *pleas in scire facias*; fifth, *pleas in error*.

The general requisites or qualities of a plea are: first, it must be *single* and *avoid duplicity*; second, it must be *direct* and *positive*, not argumentative; third, it must have convenient *certainty of time, place, and persons*; fourth, it must answer the plaintiff's *allegations* in everything *material*; fifth, it must be pleaded so as to be *capable of trial*.

The declaration is a specification, in a methodical and legal form, of the circumstances which constitute the plaintiff's *cause of action*, which necessarily consists of the statement of a legal *right*—or, in other words, a right recognized in courts of law, not merely in a court of equity—and of an *injury* to such right, remediable at law by action, as distinguished from the remedy by bill in equity.

The general requisites or qualities of a declaration are: I. That it correspond with the process, and, in bailable actions, with the *affidavit to hold to bail*—with respect to, first, the *names* of the parties to the action; secondly, the *number* of such parties; thirdly, the *character* or *right* in which they sue or are sued; fourthly, the *cause* and *form* of action. II. That it contains a statement of all

the facts necessary, in point of law, to sustain the action, and no more. III. **That these circumstances be set forth with certainty and truth—**that is, first, who are the *parties* to the suit; secondly, a *time* when every material or traversable fact happened in personal actions; thirdly, a *place* should be alleged where every material and traversable fact occurred; fourthly, it is still more material that certainty and accuracy be observed in the *more substantial parts* of the declaration, which state *the cause of action itself*.

The several parts and particular requisites of declarations are: first, the title of the declaration as to the *court*; secondly, the title of the declaration as to the *time* when it is filed or delivered; thirdly, the *venue* in the *margin*; fourthly, the *commencement*; fifthly, the *body*, according to the form of action—e. g., in *assumpsit*, six points are principally to be attended to, namely, the *inducement*, *consideration*, *promise*, *averments*, *breach*, and *damages*; sixthly, the *conclusion*; seventhly, the *profert* of deeds, probates, letters of administration, etc.; eighthly, the statement of *pledges* to be discontinued; ninthly, other *miscellaneous* points.

The cause of action in every case consists of three different points: the *right*, the *injury*, and the consequent *damages*.

The inducement in an action of *assumpsit* is in the nature of a preamble, stating the circumstances under which the contract was made, or to which the consideration has reference.

The consideration stated should appear to be *legally sufficient* to support the promise for the breach of which the action is brought.

In declaring upon *bills of exchange* and *promissory notes*, and some other legal liabilities, the mere statement of the liability which constitutes the consideration is sufficient; but in other cases of simple contracts it is necessary that the declaration should disclose a consideration, which may consist of either benefit to the defendant or detriment to the plaintiff, or the promise will appear to be *nudum pactum*, and the declaration will be insufficient.

An executed consideration consists of something *past or done* before the making of the promise.

Executory considerations are those to be yet performed, the *promise* having been made, or the thing done.

Concurrent considerations occur in the case of mutual promises, and partake of the nature of the preceding two. The plaintiff's *promise* is *executed*, but the *thing* which he has engaged to perform is *executory*, as in promises to marry, etc.

Continuing considerations are such as are executed in part only.

The three last classes are sufficient to support a contract not void for other reasons.

Great accuracy is required in the statement of the *consideration*, which, in an action of *assumpsit*, forms the basis of the contract, and if any error appear to have been made in describing it, the consequence will be that the whole contract is misdescribed.

When *no consideration* is stated in the declaration, or when that which is stated is *clearly insufficient* or *illegal*, the defendant may either demur, or move in arrest of judgment, or support a writ of error.

The perfection of pleading consists in combining brevity with the requisite certainty and precision.

The contract must be stated correctly, and if the *evidence differ from the statement* the whole foundation of the action fails, because the contract is entire in its nature, and must be proved as laid. In this respect there is a material distinction between the statement of *torts* and of contracts, the former being divisible in their nature, and the proof of part of the tort or injury being, in general, sufficient to support the declaration.

A contract or written instrument should be stated according to its legal effect. The party is not *compelled* to follow the precise form of words in which the contract was made; it suffices if he state its true legal effect and operation.

Averment signifies a positive statement of facts in opposition to argument or inference.

Variance is a disagreement or difference between two points of the same legal proceeding, which ought to agree. It is between the writ and declaration, or the allegation and the proof.

The common counts in assumpsit are: the *indebitatus* count, the *quantum meruit*, the *quantum valebat*, and the *account stated*.

In actions for torts or wrongs the declaration should state the *matter or thing* affected, the plaintiff's *right* thereto, the *injury*, and the *damages* sustained by the plaintiff.

In actions brought for *injuries to real property*, the *quality* of the realty, as whether it consists of houses, lands, or other *corporeal* hereditaments, should be shown.

In actions for injuries or taking away *goods or chattels*, it is, in general, necessary that their *quality, quantity, or number, and value* or price, be stated.

In trover, trespass, and case, *damages* only being recoverable, less peculiarity is required than in detinue and replevin, for by these latter forms of action the plaintiff can claim or recover *the goods themselves*.

In personal actions, damages are the gist of the suit; in *real* actions, the *right or title* forms the prominent subject of enquiry.

In an action on the *case*, founded on an express or implied *contract*, the declaration must *correctly state the contract*, or the particular duty or consideration from which the liability results and on which it is founded; and a variance in the description of a *contract*, though in an action *ex delicto*, may be as fatal as in an action in form *ex contractu*.

Injuries ex delicto are either committed with or without *force*, and are immediate or *consequential*; they may also arise from malfeasance, misfeasance, or non-feasance.

In some actions the *scienter*—i. e., the intent—being material, must be *alleged and proved*.

In general, when the act occasioning damage is in itself unlawful, without any other extrinsic circumstance, the intent of the wrong-doer is immaterial, in point of law, though it may enhance the damages.

In an action *ex delicto*, upon *proof of part only of the injury charged*, the plaintiff will be entitled to recover *pro*

tanto, provided the part which is proved afford, *per se*, a sufficient cause of action; for *torts* are, generally speaking, divisible.

The statement of the *time* of committing injuries *ex delicto* is seldom material; it may be proved to have been committed either on a day anterior or subsequent to that stated in the declaration.

The *place* is only material in *local* actions, or where the precise *situation*, or, rather, *description* of the land, houses, etc., is particularly stated, as in trespass and replevin.

Damages are either general or special.—**General damages** are such as the law *implies* or presumes to have accrued from the wrong complained of. **Special damages** are such as *really* took place and are not implied by law.

Presumptions of law are not, in general, to be pleaded or averred as facts.

In the case of libel or slander, great care must be taken in setting out the *particular libellous matters* or *words complained of*. The libel itself, or slanderous words, must be set out in *hæc verba*, or as uttered.

The claim of conusance or cognizance of a suit is defined to be an intervention by a *third person*, demanding judicature in the cause against the plaintiff, who has chosen to commence his action out of the claimant's court.

It is in form a question of jurisdiction between the two courts, and not between the plaintiff and defendant, as in the case of a plea to the jurisdiction, and, therefore, it must be demanded by the party entitled to conusance, or by his representative.

A plea to the jurisdiction must be pleaded in person, but a claim of conusance may be made by attorney.

Defence is defined to be the *denial* of the truth or validity of the complaint, and does not merely signify a *justification*.

Oyer is a prayer or petition, recited or entered into in pleading, that the party may *hear* read to him the deed, etc., stated in the pleadings of the opposite party, and which deed is by intendment of law in court when it is pleaded with a profert.

Imparlance, in its most general signification, means *time* given by the court to either party to answer the pleading of his opponent, as either to plead, reply, rejoin, etc., and is said to be nothing else but the continuance of the cause till a further day.

PLEAS DILATORY AND PLEAS PEREMP-TORY constitute the general division of *pleas*.

Dilatory pleas are to the *jurisdiction*, to the *disability of the person*, to the *count or declaration*, and to the *writ*, the three last being generally termed *pleas in abatement*.

Pleas to the jurisdiction.—Where the court has no jurisdiction at common law, or it has been taken away by act of Parliament, such want of jurisdiction may, in general, be pleaded in *bar*, or given in evidence under the general issue, and is not properly the subject of a plea in abatement.

In all pleas to the jurisdiction of the *superior* courts, it must be shown that there is another court in which justice may be effectually administered; for if there be no other mode of trial, that alone would give the superior court jurisdiction.

Peremptory pleas are those which lead to an issue which settles the dispute, and are called *pleas in bar* of the action.

Pleas in abatement.—Whenever the subject-matter of the plea of the defence is that the plaintiff cannot maintain *any* action *at any time*, whether present or future in respect of the supposed cause of action, it may, and usually must, be pleaded in *bar*; but the matter which merely defeats the *present* proceeding, and does not show that the plaintiff is *forever* concluded, should, in general, be pleaded in *abatement*.

Pleas in abatement are divided into those relating—

- | | |
|---|--|
| { | I. To the disability of the person suing or being sued, as |
| | { 1. Of the plaintiff; |
| | { 2. Of the defendant. |
| | II. To the count or declaration. |
| { | III. To the writ, viz.: |
| | 1. To the form of the writ, viz.: |
| | { 1. Matter apparent on the face of it; |
| | { 2. Matter <i>DEHORS</i> . |
| | 2. To the action of the writ. |

As pleas in abatement do not deny, and yet tend to delay, the trial of the merits of the action, great accuracy and precision are required in framing them. They should be certain to every intent, and be pleaded without any repugnance.

As dilatory pleas rarely affect the merits of the suit, and object mere matter of form, they constitute an exception to the general principle of pleading—that a *plea* must either traverse or confess and avoid the alleged cause of action.

Pleas in bar go to the *merits* of the case, and deny that the plaintiff has *any* cause of action.

They are of *two* kinds, as well in action on contracts as for torts, viz.: **first**, they *deny* that the plaintiff *ever* had the cause of action complained of; or, **secondly**, they *admit* that he *once had* a cause of action, but insist that it *no longer subsists*, having been determined by some *subsequent* matter. They are also either to a whole or to a part of the declaration.

The true object of pleading is to apprise the adverse party of the ground of defence, in order that he may be prepared to contest it, and not be taken by surprise.

It is well settled that, in an action for a libel or slanderous words, the defendant cannot, *under the general issue*, give in evidence the *truth* of the matter, or any part of it, *even in mitigation of damages*, but *must justify specially*.

It is a matter of prudence, depending on the facts of each case, whether or not to plead a justification.

Pleas in bar must either deny or confess and avoid the matter alleged in the plaintiff's declaration.

It is a general rule at common law that matters in mitigation of damages, etc., which cannot be specially pleaded, may be given in evidence under the general issue.

The general issue or general plea is what denies at once the whole declaration without offering *special* matter.

Analytical table of the defences to actions on contracts not under seal, the sub-divisions being nearly the same in each form of action:

- I. Deny that there ever was cause for action.
 1. Deny that a sufficient contract was ever made.
 1. That no contract was, in fact, made.
 2. Incompetency of plaintiff to be contracted with.
Plaintiff an alien enemy at time of contract.
 3. Defendant incapable of contract.
 1. Infancy.
 2. Lunacy, Drunkenness, etc.
 3. Coverture.
 4. Duress.
 4. Insufficiency of consideration.
 1. Inadequacy of consideration.
 2. Illegality of consideration, viz.:
At common law, and
By different statutes.
 5. Contract obtained by fraud.
 6. The act to be done illegal or impossible.
 7. The form of contract insufficient.
 1. At common law.
 2. By statute.
As statute against frauds.
 8. No sufficient stamp.
 2. Admit a sufficient contract, but show that before breach there was
 1. A release.
 2. Parol discharge.
 3. Alteration in terms of contract by consent.
 4. Non-performance by plaintiff of a condition precedent, alteration, etc.
 5. Performance, payment, etc. [ident, alteration, etc.]
 6. Contract became illegal or impossible to perform.
- II. Admit that there was no cause of action, but avoid it by showing subsequent or other matter.
 1. Plaintiff no longer entitled to sue.
 1. An alien enemy.
 2. Attainted.
 3. Outlaw.
 4. A bankrupt, insolvent debtor, etc.
 2. Defendant no longer liable to be sued.
 1. A certified bankrupt.
 2. An insolvent debtor.
 3. Debt recoverable only in a court of conscience.
 4. Cause of action discharged.
 1. By payment.
 2. Accord and satisfaction.
 3. Foreign attachment.
 4. Tender.
 5. Account stated and negotiable security taken by [plaintiff].
 6. Arbitrament.
 7. Former recovery.
 8. Higher security given.
 9. A release.
 10. Statute of limitations.
 11. Set-off.
 5. Plea by executor, etc.

Matter of *estoppel* must be specially pleaded as such.

In framing a special plea it is also necessary to consider whether the defendant is under terms of pleading *issuably*.

An issuable plea is a plea in chief to the merits upon which the plaintiff may take issue and go to trial on a general demurrer for some defect in substance.

A plea in abatement is not an issuable plea.

In every species of *assumpsit* all matters in confession and avoidance shall be specially pleaded.

The general qualities of a plea in bar are:

First. That it be adapted to the nature and form of the action, and also be conformable to the count.

Secondly. That it answer all which it assumes to answer, and no more.

Thirdly. That it deny or admit and avoid the facts; and herein of giving color, and of pleas amounting to the general issue.

Fourthly. That it be single.

Fifthly. Certain.

Sixthly. Direct and positive, and not argumentative.

Seventhly. Capable of trial.

Eighthly. True; and herein of *sham* pleas.

Pleas in bar, unlike pleas in abatement, offer matter which is a conclusive answer or defence to the action upon the merits. They are divisible into pleas of *traverse* or *denial*, and pleas by way of *confession* and *avoidance*, as all pleas in bar must *deny* or *confess and avoid* the facts stated in the declaration.

Pleas in denial are either the general issue in those actions in which so general a traverse is admissible, or they occur in instances in which, there being no general issue, as in covenant, etc., some specific fact is specially disputed.

The *principles* of pleading and express rules require, in general, that **matter in confession and avoidance should be specially pleaded**, and not be given in evidence under the general issue or traverse.

A special plea amounting to the general issue or general plea is bad.

A plea in confession and avoidance must give *color* to the plaintiff.

To give color is to give credit for an apparent or *prima facie* right of action.

Pleading is a statement of *facts* and not a statement of argument; it is, therefore, a rule that a plea should be direct and positive, and advance its position of fact in an absolute form, and not by way of rehearsal, reasoning, or argument.

Every plea should be so pleaded as to be *capable of trial*, and, therefore, must consist of matter of *fact*, the *existence* of which may be tried by a jury on an issue, or the *sufficiency* of which, as a defence, may be determined by the court upon *demurrer*, or of matter of *record* which is triable by the record itself.

Every plea should be true and capable of proof, for, as it has been quaintly said, "Truth is the goodness and virtue of pleading, as certainty is the grace and beauty of it."

Sham pleading—that is, the pleading of matter known by the party to be false, for the purpose of delay or other unworthy object—has always been considered a very culpable abuse of justice, and has often been censured and set aside with costs.

The rules which prevail in the construction and allowance of a plea in bar are: first, that it is to be construed most strongly against the defendant; secondly, that a general plea, if bad in part, is bad for the whole; thirdly, that surplusage will not, in general, vitiate.

If an allegation is *capable* of two meanings, that exposition shall be adopted which will support, not that which will destroy, the pleading.

Pleas by several defendants.—In general, when the defence is in its nature joint, *several defendants* may join in the same plea, or they may sever without committing fault of duplicity in pleading; and one defendant may plead in abatement, another in bar, and the other may demur.

A plea which is bad in part is bad in toto.

The plaintiff may, in an action in form *ex delicto*, against several defendants, enter a *nolle prosequi* as to one of them, but in actions in form *ex contractu*, unless the defence be merely in the *personal* discharge of one of the defendants, a *nolle prosequi* cannot be entered as to one defendant with-

out discharging the others, for the cause of action is entire and indivisible.

Pleas of set-off.—In actions upon *simple contracts* or *specialties* for the payment of *money*, the defence frequently is a cross-demand for a *debt* due from the plaintiff to the defendant. At *common law*, and independently of the statutes of set-off, a defendant is, in general, entitled to retain or claim, by way of *deduction*, all just allowances or demands accruing to him, or payments made by him, in respect of the *same* transaction or account, which forms the ground of action; but before the statutes of set-off, where there were *cross-demands unconnected with each other*, a defendant could not, in a court of law, defeat the action by establishing that the plaintiff was indebted to him, even in a larger sum than that sought to be recovered, and relief could only be obtained in a court of equity.

Some of the principal rules upon the subject of set-off are that the debt sued for, and that sought to be set off, should be *mutual debts*, and due to each of the parties respectively in the *same right* or *character*.

The statutes speak merely of *mutual debts*, consequently the demand of each party must be in the nature of a *debt*, so that a set-off is excluded in all actions *ex delicto*, and it cannot be admitted even in actions *ex contractu* if the claim of either party be for uncertain or unliquidated *damages*.

It has been held that a debt of *inferior degree* cannot be set off against one of a *higher degree*.

The debt attempted to be set off must be *completely due* and *in arrear* at the time the action *was commenced*, and a legal and *subsisting* debt, not barred by the statute of limitations.

REPLICATIONS.—Before the plaintiff *replies* or *demurs* to the plea he should consider whether or not he may treat it as a nullity and sign judgment.

If the plea does not profess to answer the whole action, and leave a part unanswered, the plaintiff should sign judgment *pro tanto*.

If the plea properly conclude "to the country," etc., *in assumpsit*, as well as in other actions, the replication may add the common *similiter*—i. e., "doth the like," etc., or, if the plea conclude with a verification, may deny the

alleged matter of defence, or may confess and avoid it by applying *new matter*.

The conclusion to a special plea may be to the *country*, as thus: "and this the plaintiff prays may be enquired of by the country," etc., or with a verification, thus: "and this the plaintiff is ready to verify."

When the plea concludes to the *country* the replication consists either of the common or special *similiter*.

The *common similiter* is: "and the plaintiff doth the like."

The *special similiter* is: "and the plaintiff, and as to the said pleas of the defendant, by him first and secondly above pleaded, and whereof he hath put himself upon the country, doth the like."

The parts of a replication to a plea containing new matter are: first, the *commencement*; secondly, the *body*; and, thirdly, its *conclusion*.

The commencement in such case professes wholly to deny the effect of the defendant's plea.

The body shows the ground on which that denial is founded.

The conclusion is either to the country or to the record, if it merely deny the plea; but if the replication contains *new matter*, it should *conclude* with a *verification* and a prayer that judgment be awarded in the plaintiff's favor.

The *body* of the replication contains matter of *estoppel*, a *traverse* or *denial* of the plea, a *confession and avoidance* of it, or, in the case of an *evasive* plea, a *new assignment*.

There is no real distinction between traverses and denials; they are the same in substance.

Any pleading by which the truth of the opponent's allegation is disputed is termed a pleading by way of traverse or denial.

The first object of pleading being to bring the point in dispute between the parties, at as early a stage of the cause as possible, to an *issue* or point which is *not multifarious* or *complex*, the issue must, in general, be single; but this *single point* may consist of *several facts* if they be dependent and connected.

A party may traverse and deny any *material* and issuable allegation in his opponent's pleading.

But if an allegation in the opposite pleading be altogether *immaterial*, it cannot be traversed, otherwise the object of pleading, viz., the bringing the parties to an issue upon a matter or point decisive of the merits, would be defeated.

It is also a most material rule upon this subject that a traverse should be taken on *matter of fact*—not mere matter of conclusion of *law*.

The traverse should also be on some *affirmative matter*, an not put in issue a negative allegation, nor too *large*, nor ye too *narrow*, so as to prejudice the defence.

In general, a traverse, denial, or allegation, should be so framed as to be *divisible*, and entitle the party pleading to recover *pro tanto* if he prove part of the allegation.

Replications denying a particular fact or facts are, in point of *form*, of *three* descriptions: *first*, the plaintiff protests some fact or facts, and denies the other, concluding to the country; or, *secondly*, he at once denies the particular fact intended to be put in issue, and concludes to the country; or, *thirdly*, formally traverses a particular fact, and concludes with a verification.

It is a rule that every pleading is taken to confess such traversable matter of *fact* alleged on the other-side as it does not traverse.

It is a general rule that there cannot be a traverse after a traverse where the first was material and of matter necessarily alleged.

The general rule is that *a replication must confess and avoid or traverse the matter stated in the plea*; and, in this respect, a replication resembles a plea.

New assignment is a *more minute and circumstantial* manner of *re-stating* the cause of action, or some part thereof, alleged in the declaration, in consequence of the defendant having, through mistake or design, omitted to answer it in his plea. It is a kind of replication in the *nature* of a new declaration.

The object of a new assignment is to correct an error in the plea, and to aver that the defendant has omitted to answer the whole or a part of the true ground of complaint.

New assignments are principally confined to the action of

trespass, as it rarely becomes necessary to new-assign in any other form of action.

The conclusion of a new assignment must be with a verification, in order that the defendant may have an opportunity of answering it.

A new assignment, being in the nature of a new declaration, and dismissing the previous pleading from consideration, so far as respects the matter newly assigned, the defendant should plead to it precisely as to a declaration, either by denying the matter newly assigned by the plea of not guilty, etc., or by answering it by a special plea of matter of justification; and he may plead several pleas.

To the plea or pleas to the new assignment the plaintiff should *reply* precisely as to pleas to a declaration, and if the plea be such as would require a new assignment, if pleaded to a declaration, the plaintiff should again new-assign to such plea.

The conclusions of replications, in point of *form*, should either be to the *country* or *with a verification*.

It is an established rule, applicable to every part of pleading subsequent to the declaration, that when there is an affirmative on one side and a negative on the other, or *vice versa*, the conclusion should be to the country, although the affirmative and negative be not in express words, but only tantamount thereto.

It is a general rule that when *new matter* is alleged in a replication, it should conclude with an averment or verification, in order to give the defendant an opportunity of answering it.

The qualities of a replication, in a great measure, resemble those of a plea, viz.: *first*, that it must answer so much of the plea as it professes to answer, and that if bad in part it is bad for the whole; *secondly*, that it must be conformable to, and not depart from, the count; *thirdly*, that it must present matter of *estoppel*, or must *traverse* or *confess and avoid* the plea; *fourthly*, that, like a plea, it should be certain, direct, positive, and not argumentative, and also that it be triable; *fifthly*, that it must be single.

It is a settled rule that the replication must not *depart* from the allegations in the declaration in any *material* matter.

A departure in pleading is said to be when a party quits or departs from the case or defence which he has first made, and has recourse to another; it occurs when the replication or rejoinder, etc., contains matter not pursuant to the declaration or plea, etc., and which does not support and fortify it.

The only mode of taking advantage of a *departure* is by demurrer, which may be either general or special; and if the defendant or the plaintiff, instead of demurring, take issue upon the replication or the rejoinder containing a departure, and it be found against him, the court will not arrest the judgment.

If the plaintiff do not dispute and cannot avoid the *facts* stated in the plea, but contends that their legal operation is insufficient to defeat the action, he must *demur* to the plea.

The replication must not be double—that is, contain two answers to the same plea.

When a replication or a plea in bar in replevin concludes *to the country*, the defendant can only demur, or add the common *similiter*, which is, “and the defendant doth the like,” and it is material that the defendant should take care that the *similiter* be added, for otherwise he cannot move for judgment, as in case of a nonsuit.

A rejoinder is the defendant's answer to a replication, and is, in general, governed by the same rules as those which affect pleas, with this additional quality: that it must *support*, and not *depart* from, the plea.

Sur-rejoinders, rebutters, and sur-rebutters seldom occur in pleading, and are governed by the same rules as those to which the previous pleading of the party adopting them is subject.

Issue is defined to be a single, certain, and material point, issuing out of the allegations or pleadings of the plaintiff and defendant, though in common acceptation it signifies the *entry* of the pleadings themselves.

An issue is either in *law*, upon a demurrer, or in *fact*, when the matter is triable by the court upon *nul tiel record*, or a jury upon pleadings concluding to the country. The

term "issue" is proper where only one plea has been pleaded, and though it be applied to several counts and issue is joined upon such plea. An issue should, in general, be upon an *affirmative and a negative*, and not upon two affirmatives. It should also be upon a *single and a certain point*, and its principal quality is that it must be upon a *material point*.

An informal issue is where a *material* allegation is traversed in an *improper or artificial manner*.

Repleader.—When an issue is *immaterial* the court will award a *repleader* if it will be the means of effecting substantial justice between the parties, but not otherwise.

In repleader—i. e., to plead again—the parties must begin again at the first fault which occasioned the immaterial issue; thus, if the declaration be insufficient, and the bar and replication are also bad, the parties must begin *de novo*, but if the bar be good, and the replication ill, at the replication.

Where the plea is good in form, though not in fact, or, in other words, if it contain a defective title, or ground of defence by which it is apparent to the court by the defendant's own showing that in *any* way of putting it he can have *no merits*, and the issue joined thereon be found for him, there, as the rewarding of a repleader could not mend the case, the court, for the sake of the plaintiff, will at once give judgment *non obstante veredicto*.

But where the defect is not so much in the title as in the manner of stating it, and the issue joined thereon is immaterial, so that the court knew not for whom to give judgment, whether for the plaintiff or defendant, then, for the more satisfactory administration of justice, they will award a repleader.

A judgment *non obstante veredicto* is always upon the *merits*, and never granted but in a very clear case; a repleader is upon the *form and manner* of pleading.

When matter of defence had arisen after the commencement of the suit, it could not be pleaded in bar of the action *generally*, but must, when it had arisen *before plea* or continuance, be pleaded as to the *further maintenance* of the suit, and when it had arisen *after plea*, and

before replication, or *after issue joined*, then *puis darien continuance*.

If any matter of defence has arisen after an *issue in fact* has been joined, or after a joinder in demurrer, it may be pleaded by the defendant, as that the plaintiff has given him a release, or that the plaintiff is a bankrupt, etc. And if the defendant became bankrupt and obtained his certificate after issue joined, he should plead this defence *puis darien continuance*.

So it may be pleaded in abatement that a *feme sole* plaintiff has married, or, in an action by an administrator, that the plaintiff's letters of administration had been revoked, *puis darien continuance*, etc.

Pleas of this kind are either in abatement or in bar.

A plea *puis darien continuance* is not a departure from, but is a waiver of, the first plea, and no advantage can afterwards be taken of it, nor can even the plaintiff afterwards proceed thereon.

The courts will sometimes set aside a plea *puis darien continuance* when it is manifestly fraudulent and against the justice of the case.

DEMURRERS.—When the declaration, plea, or replication, etc., appears on the *face of it*, and without reference to *extrinsic* matter, to be defective, either in substance or form, the opposite party may, in general, *demur*.

Demurrer has been defined to be a declaration that the party demurring “will go no further,” because the other has not shown sufficient matter against him that he is bound to answer.

Where the pleading is defective in *substance* it is advisable, in general, to demur, because the party succeeding thereon is entitled to costs; but where the judgment is reversed in error, no costs are recoverable.

A **demurrer** admits the *facts* pleaded, and merely refers the question of their *legal* sufficiency to the decision of the court.

Demurrers are either general or special; general, where no particular cause is alleged; **special**, when the particular imperfection is pointed out and insisted upon as the ground of demurrer; the former will suffice

when the pleading is defective in *substance*, and the latter is requisite where the objection is only to the *form* of pleading.

A demurrer is either to *the whole*, or to *a part only*, of a declaration.

In point of form no precise words are necessary in a demurrer; and a plea, which is in substance a demurrer, though very informal, will be considered as such; and it is a general rule that there cannot be a demurrer to a demurrer.

A party should not demur unless he be certain that his own previous pleading is substantially correct; for it is an established rule that, upon the argument of a demurrer, the court will, notwithstanding the defect of the pleading demurred to, give judgment against the party whose pleading was first defective in *substance*; for, on demurrer, the court will consider the *whole* record, and give judgment for the party who thereon appears to be entitled to it.

DEFECTS IN PLEADING are aided or cured without any actual *amendment*, viz.: first, by *pleading over*; secondly, by *intendment* or *presumption after verdict*; and, thirdly, by the *statutes of jeofails*.

Pleading over is to answer the defective pleading in such a manner that an omission or informality therein is *expressly* or *impliedly* supplied, or rendered formal or intelligible.

Intendment after verdict is a doctrine founded on the *common law*, independent of any statutory enactments; the general principle upon which it depends appears to be that where there is any defect or omission in pleading, whether in *substance* or *form*, which would have been a fatal objection upon demurrer, *yet*, if the issue joined be such as necessarily required on the trial proof of the facts so defectively stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect or omission is *cured by the verdict*.

The main rule on the subject of intendment is that a verdict will aid a *defective statement* of title, but will never assist a statement of a *defective title* or cause of action.

Cured by verdict is an expression signifying that the

court will, *after* a verdict, presume or intend that the particular thing which appears to be defectively stated or omitted in the pleading *was duly proved* at the trial.

THE SCIENCE OF PLEADING was no doubt derived from Normandy. The use of stated forms of pleading is not to be traced among the Anglo-Saxons. Pleading was cultivated as a science in the reign of Edward I. The object of pleading is to ascertain, by the production of an issue, the subject for decision.

I. The rules which tend simply to the production are :

(a.) That after declaration the parties must, at each stage, demur or plead, either by way of traverse or by way of confession and avoidance; and as to the nature and property of pleadings in general, without reference to their being by traverse, or by confession and avoidance, the properties are:

That every pleading must be an answer to the whole of what it adversely alleged.

That every pleading is taken to confess such traversable matters alleged on the other side as it does not traverse, but dilatory pleas and pleas by estoppel are exceptions, as also a new assignment.

(b.) That, upon a traverse, issue must be tendered.

(c.) That an issue well tendered must be accepted.

II. The rule which tends to secure the materiality of the issue is :

(a.) That all pleadings must contain matters pertinent and material; for a traverse must not be taken of an immaterial point, and a traverse must be neither too large nor too narrow.

III. The rules which tend to produce singleness or unity in the issue are :

(a.) That pleadings must not be double.

(b.) But it is allowable both to plead and to demur to the same matter by leave of the courts or a judge.

IV. The rules which tend to produce certainty or particularity in the issue are :

(a.) That the pleadings must have certainty of place.

(b.) That the pleadings must have certainty of time.

- 3 (c.) That the pleadings must specify quality, quantity, and value.
- 4 (d.) That the pleadings must specify the names of persons, whether parties to the suit or parties of whom mention is made in the pleading.
- 5 (e.) That the pleadings must show title.
- 6 (f.) That the pleadings must show authority.
- 7 (g.) That, in general, whatever is alleged in pleadings must be alleged with *certainty*.

The rules which tend to certainty are limited and restricted by the following subordinate rules:

It is not necessary in pleading to state that which is merely matter of evidence.

It is not necessary in pleading to state that matter of which the court takes notice *ex officio*.

It is not necessary to state matter which should come more properly from the other side.

It is not necessary to allege circumstances necessarily implied.

It is not necessary to allege what the law will presume.

A general mode of pleading is allowed where great proximity is thereby avoided.

A general mode of pleading is often sufficient where the allegation on the other side must reduce the matter to certainty.

No greater particularity is required than the nature of the thing pleaded will conveniently admit.

Less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading.

Less particularity is necessary in the statement of the matters of inducement or aggravation than in the main allegations.

With respect to acts valid at common law, but regulated as to the mode of performance by statute, it is sufficient to use such certainty of allegation as was sufficient before the statute.

V. The rules which tend to prevent obscurity and confusion in pleading are :

what is a departure?
what is a variance?

- 1 (a.) That the pleading must not be insensible or repugnant.
- 2 (b.) That the pleadings must not be ambiguous or doubtful in meaning; and when two different meanings present themselves, that construction shall be adopted which is the more unfavorable to the party pleading.
- 3 (c.) That the pleadings must not be argumentative.
- 4 (d.) That the pleadings must not be hypothetical or in the alternative.
- 5 (e.) That the pleadings must not be by way of recital, but must be positive in their form.
- 6 (f.) That things are to be pleaded according to their legal effect or operation.
- 7 (g.) That the pleadings should observe the ancient and known forms of expression, as contained in approved precedents.

8 (h.) But formal commencements and conclusions are dispensed with.

9 (i.) That a pleading which is bad in part is bad altogether.

VI. The rules which tend to prevent prolixity and delay in pleading are:

- 1 (a.) That there must be no departure in pleading.
- 2 (b.) That where a plea amounts to the general issue it should be so pleaded.
- 3 (c.) That surplusage is to be avoided.

VII. The other miscellaneous rules are:

- 1 (a.) That the declaration must be conformable to the writ.
- 2 (b.) That the declaration shall have its proper commencement, and should in conclusion lay damages and allege production of suit.
- 3 (c.) That pleas must be pleaded in due order.
- 4 (d.) That pleas in abatement must give the plaintiff a better writ or declaration.
- 5 (e.) That dilatory pleas must be pleaded at a preliminary stage of the suit.
- 6 (f.) But pleadings do no longer conclude to the country, or with a verification.
- 7 (g.) And profert of a deed is dispensed with.
- 8 (h.) That all pleadings must be properly entitled
- 9 (i.) That all pleadings ought to be true.

The order of pleadings at common law, in all actions except replevin, is as follows:

- (1.) Declaration.
- (2.) Plea.
- (3.) Replication.
- (4.) Rejoinder.
- (5.) Sur-rejoinder.
- (6.) Rebutter.

(7.) Sur-rebutter; after which the pleadings have no distinctive names, for beyond this stage they are very seldom found to extend.

The pleadings 1, 3, 5, and 7 emanate from the plaintiff; the remainder, from the defendant.

The pleadings in replevin are as follows:

- (1.) Plaint or declaration.
- (2.) Avowry, cognizance, or plea of *non cepit*.
- (3.) Plea in bar.
- (4.) Replication, etc., the ordinary name of each pleading being postponed by one step.

The pleadings in equity are thus arranged:

- (1.) Bill of information.
- (2.) Answer, plea, demurrer, or disclaimer.
- (3.) Replication.

The pleadings in criminal law are:

- (1.) Indictment or information.
- (2.) Plea or demurrer.
- (3.) *Similiter* or joinder.

The pleadings in ecclesiastical causes are:

- (I.) In criminal causes.
 - (a.) The articles.
- (II.) The plenary causes, not criminal.
 - (a.) The libel.
- (III.) In testamentary causes.
 - (a.) The allegation.

Every subsequent plea, in all causes and by whatever party given, is termed—

- (b.) An allegation. ˆ

SUGGESTIONS TO STUDENTS.

THE START.

Melancholy and untrue is the picture which they draw of the legal study who represent its prominent features to be those of subtlety and impudence, and of a labor dry and barren. Rather would I compare it to a mountain, steep and toilsome in its first approaches, but easy and delightful in its superior ascent, and whose top is crowned with a rich and lasting verdure. Be a student, then, according to your own acceptation of the idea, and remember this as a maxim which arises from the very character of the study—that *he who is a great lawyer must be a great and a good man*. Be not impatient of your progress if you find it at first difficult and tardy—this will be but a natural consequence; you may, however, find it less so than you now imagine. Should this prove the case, do not babble to every one you meet the great plans which you have formed, or the achievements you have executed; this will expose you to ridicule or envy, and will be unworthy of you. I know not a more accurate criterion of a noble mind than that silent confidence in its own powers which incites to great endeavors and leaves the event to time. The labors of such a mind will be secret, but ardent, and its success will be known to the world only by the superiority of the actions it incites. In the outset, let me say that he who has not a mind susceptible of the habits of labor, or willing to acquire them, *will never succeed at the bar*; if such a man should entertain a design of studying the law, I would advise him to lay it aside.—*Raithby: Study and Practice of the Law*.

WHEN TO ENTER AN ATTORNEY'S OFFICE.

Many young men, on leaving college, at once place themselves in a law office, and are frequently made mere

drudges to copy long declarations, pleas, bills in chancery, deeds, letters, etc., which the proprietor of the office was either too much engaged or too indolent to copy himself, and which neither improve the student's handwriting, nor add one mite to his legal stores. Others are suffered to grope through the intricacies of the law without torch or clue, and destitute of all method. Left to self-direction they essay the perusal of some black-lettered folio as the herculean task alone necessary to be surmounted; the difficulties of this widely diffused science are then to vanish, and this musty and ponderous folio is to be the avenue through which they are to pass, as by enchantment, into smooth and uninterrupted paths. Disappointment, however, is the certain reward of such students. Their minds are not prepared for so vast an undertaking. The first beams of legal knowledge have not been felt when they ignorantly and rashly fly, like Icarus, into the very face of the sun, and meet with the same inevitable and ruinous fate. Some, again, are contented with the *scraps* and *bits* of knowledge gleaned from writing deeds and declarations; from listening to the protracted narratives of clients to their counsel, and the hasty advice which the former receive from the latter; or from an occasional attendance on courts of justice; whilst the remainder of their *office-hours* are dedicated to politics and pamphlets, or the ephemeral and amusing productions of the day. In this round of *time-slaughtering* the three or four years originally appropriated as the period of legal study have elapsed, and the student must now embark in the practice of a profession, the very rudiments and general contour of which have never been fully presented to his mind. This is by no means a picture of too high coloring, but a faithful sketch of the history of many students of law. We, therefore, earnestly entreat the student to devote three-fourths of the period allotted for his legal apprenticeship to private study, and by no means to enter an office until the year previous to his entering into the practice of his profession. If the public records be accessible to him, he should read occasionally the entire record of a case carried from an inferior tribunal to the supreme court; the perusal of a few records of this kind would impress on his mind a distinct view of

the whole routine of an action, through, perhaps, a hundred different forms or entries, to the return of the executory process.—*Hoffman's Course of Legal Study.*

QUICK PERCEPTION AND ANALYSIS.

There are certain qualities of the mind of a very noble nature, the want of which cannot be dispensed with in that man who is determined to be eminent at the bar. A clear intellect, by which I mean the *faculty of darting in a moment upon the truth*, is indeed a choice gift of nature; it may be improved, but it never can be acquired; it is that wonderful power before which ambiguity and confusion fly away; it is that mighty influence which irradiates whatever system it pervades, which separates in an instant the most entangled and perplexed ideas; this it is which descends to the minutest circumstances in the affairs of men, and, dissipating the mists with which they may be enveloped by craft or by ignorance, draws forth to the light the little secret motive which gives them their real character, and which is so often sought in vain.—*Raithby: Study and Practice of the Law.*

LAW AND PRACTICE.

The *study* of the law, though it requires vigorous comprehension and habits of patient thinking, demands, however, no very peculiar modification of talent. Whoever can be made to understand with facility may soon comprehend its system; whoever can think minutely may soon be master of its niceties. As to its *practice*, it is otherwise. Men who in solitude think correctly and reason clearly are, in public, masters neither of their own thoughts nor their words. The happy exposition of a subject; the ingenious elucidation of difficulties, the fluency of utterance, the rapidity and skill of forensic evolutions, are impracticable to themselves and irresistible in others. When an intricate controversy must be unfolded in a perspicuous manner to the mind of the judge, or a tangled tissue of blended facts and law must be familiarly unravelled to a jury—that is, at the very crisis, when the contest is to be decided by the authority of the land—learning and judgment are of no avail to the client or his counsel without the assistance of an *eloquent voice* to

make them known. Then it is that all the arts of the orator are called into action, and that every part of a rhetorical discourse finds its place for the success of the cause. The diamond in the mine is no brighter than the pebble upon the beach. From the hand of the lapidary must it learn to sparkle in the solar beam and glitter in the imperial crown. The crowd of clients, the profits of practice, and the honors of reputation, will all inevitably fly to him who is known to possess, not only the precious treasures of legal learning, but the *keys*, which alone can open them to the public eye.—*Adams' Harvard Law Lectures.*

WHAT YOU MUST POSSESS.

The studies by which a man may gain the summit of legal excellence are infinitely varied. He must possess the most opposite qualities, and be capable of exercising them; he must have a quick discernment, and yet a steady understanding; he must not be destitute of imagination, yet must he possess a sound judgment; he must know books, yet be *well learned in mankind*; the subtle technicality of law and the enlarged beauties of classical learning, the solitary habits of study and the easy refinement of active life, must equally distinguish him. In fine, he must unite in himself all those noble qualities by which he may at once command the attention of the acute and the learned, and render himself intelligible to the most ordinary capacity. Let him remember that every eye is busy in the discovery of his weaknesses, and that every ear is open to the detection of his errors. I know of no scenes in life where men stand or fall more completely by the strength or the weakness of their talents than in our courts of law. The utmost tenderness is shown to the embarrassment of inexperience, but ignorance finds no mercy. It is true, it is not hissed off the stage, but it sinks beneath the awful, chilling influence of surrounding wisdom.—*Raithby.*

UNWRITTEN LAW OF THE FORUM.

The talented author of Reed's Practical Suggestions, in speaking of the art of conducting a law suit, says: The law, as written in the text-books and revealed by the reports, is

not the same as that administered by judges and juries. The reports over which we pore day and night have no presentations of the faces, character, voices, dress, deportment, and evident bias, one way or the other, of the parties and witnesses. The glance of intelligence of a juror, not knowing he is watched, the frown of another, and the smile of still another—all these are missed. But they are signs by which the lawyer has been guided, almost unconsciously to himself. There is no place in the world where the feelings have more unconstrained play than in a crowded court room during an important and exciting trial. The great crowd goes along with everything, as well as the audience follows the play in the theatre, and, though the sheriffs and bailiffs keep the best of order, that whole throng of listeners perceptibly manifest their approval or disapproval of everything that is said or done. The bar feels this influence—they have brothers and fathers in that company. The judge feels it too, and he has an almost fraternal feeling for those people out there; and the jury—why, they came from that multitude; and all of them, judge, counsel, witnesses, parties, jury, and audience, are men and women, and, like other men and women, have their weaknesses and infirmities, their loves and hatreds, their vices and their many virtues too. All of them *live in their feelings*, and these impulsive, heady feelings are ever *running away with their reasons* in unguarded moments. And thus is there a *different law* administered at *nisi prius* from that which is found in Blackstone and Story, and this law must be learned by him who would be a successful lawyer.

FLUENCY AND READINESS AT THE BAR.

In the exercises of the forum everything depends upon ease and fluency of speech. The talent is rendered a peculiar one; two circumstances have made it so—the *variety* and *instantaneousness* of the occasions. Hence, not only terseness and elegance are required from the advocate upon important and elaborate matters, but a quickness of expression also, calculated for short and shrewd debate; for you must have observed that there are numberless occasions, in

the course of practice, in which a readiness of observation and reply have stood him in better stead than all the most solid powers of the judgment combined together at that moment could perform. Men are apt to be caught by the activity of speech, which, as it is often the talent of an inferior mind, is not to be regarded as the standard of great powers, but which will ever be advantageous in this sort of commerce with the world. A superficial man, even in cases of importance, if he possesses a liveliness and rapidity of speech, will be often more welcome than the hesitating, tedious man of judgment.

How often do people say, when describing a speaker, "Why, to be sure, there is not much depth in him, but, then, he is never at a loss; he speaks charmingly; his words seem always ready!" On the other hand, "I cannot bear to hear that man; I dare say he is a very wise man, but he keeps me in constant pain; he seems always so much in want of words that absolutely one expects he will every moment stop in the middle of his speech. I would rather give up my law suit than be bound to hear that man speak frequently." Now, this is a very common sentiment, expressed by the vulgar, indeed, but by which the wise man is not wholly unaffected; and I may here add that it is not by the suffrage of the *wise alone* that the advocate rises in his profession. Fluency of speech I conceive to be an art, and, like any other art, it is to be acquired by observation and diligence.—*Raithby*.

THE JUDGE.

The perfect judicial character has been sketched more than once by the hand of a master. Lord Bacon says, "If any one sues to be made a judge, for my own part, I should suspect him. Let not a judge meet a cause half-way, nor give occasion to the party to say his counsel or proofs were not heard." Judge Hutton is advised to be "a light to jurors to open their eyes, but not a guide to lead them by the nose; that he should not affect pregnancy and expedition by an impatient and catching hearing of the counsellors at the bar." So in another place he says, "Patience and gravity

of hearing is an essential part of justice, and an overspeaking judge is no well-tuned cymbal; it is no grace to a judge first to find that which he might have heard in due time from the bar; or to show quickness of conceit in cutting off evidence or counsel too short; or to prevent information by questions, although pertinent. Judges ought to be more learned than witty, more reverend than plausible, more advised than confident. Above all things, *integrity* is their portion and proper virtue." Another writer says, "The judge should know nothing of the parties, but their *names* on his docket; nothing of the cause, but from the evidence; nothing of the result and its consequences, but the judgment which the LAW pronounces." Sir John Fortescue, in speaking of the courts in his time (1470), says, "The judges of England do not sit in the King's Courts above three hours in the day—that is, from eight in the morning till eleven. The courts are not open in the afternoon. The judges, when they have taken their refreshments, spend the rest of the day in the STUDY OF THE LAWS AND READING OF THE HOLY SCRIPTURES."

WHAT IS NEEDED IN COURT.

Those who have frequented the criminal courts cannot but sometimes have witnessed the unpleasing triumph of a loquacious wrangler over deep discriminations and profundity of thought. These, indeed, are busy scenes in which, if you mix and hope to succeed, you must unite these jarring capacities. The crowd are gaping for a smart speech, and some of the attorneys that conduct business in these courts have been long accustomed to all the lively keennesses of practice; they, therefore, expect to see a congenial capacity in those they employ as counsel; and, in short, will never think of giving a case to that man who *has it not*, however extended or refined his knowledge may be. To be able to meet every opponent upon his own ground is an art which the lawyer must condescend to learn, seeing there are occasions that may demand the exercise of it; and it is not an art which has been acquired and exercised heretofore by many great men. You must be able at once to influence the

passions of a jury and to convince the understanding of the judge; you must appear in all the varied characters of the abstract reasoner and the lively wit, the accurate definer and the polished rhetorician. The dignity of wisdom and the facility of business, the nervousness of eloquence and the easy familiarity of colloquy, must take their turns in the varieties of your practice. In short, *all that is excellent* in general knowledge and refined in legal intelligence must be called in to complete the character of *a leader in the courts*. In the court of chancery, for instance, the scene is entirely altered; the wrangling of the forum is exchanged for the reasoning of the schools. The decisions of the court are not at the disposal of twelve men; they lie in the breast of one man, who is himself governed, not only by the decisions of his predecessors, but by a peculiar kind of equity which professes to aid the sterility or to correct the severity of the common law without opposing its dictates or violating its principles. In this court, therefore, there is no jury, whose imaginations the orator can hope to influence, or whose passions to mislead; all here is *cool reasoning* and nice disquisition. Here, too, is agitated some of the most abstruse and difficult learning of the law.—*Raithby*.

READING AT THE BAR.

Nothing is more wearisome to the auditors of the advocate than the long citations he is under the necessity of making from legal authorities, except it be the drawling and careless manner in which they are read. The reading of an authority, if not the signal for inattention, especially to juries, is at least a forewarning of fatigue. Policy, therefore, might dictate more attention to this matter. Lord Mansfield, it is said, possessed the art, by the agreeableness of his reading, to render even a *statute* interesting.—*Hoffman*.

HISTORY AND LAW.

To assert that he whose professional life depends upon his powers of reasoning and argument, and whose argument rests upon his knowledge of the laws, may be ignorant of

the circumstances that have contributed to the formation of their original nature, and succeed, is an outrage upon common sense. As well may you say a statesman can govern without a knowledge of the genius of the people whose affairs he is to direct, or a physician judge of a disease without an acquaintance with the previous and accompanying symptoms, as that the lawyer should understand the laws of a country while the events that gave them birth and the systems by which they have been formed are unknown to him. A good lawyer **MUST BE FAMILIAR WITH HISTORY.** How often would it have proved a most tedious and almost insupportable task to those whose high office it is to hear and determine upon the arguments of counsel, had they who have filled the character of an advocate at the bar been generally unversed in the events recorded in history! How confined would, to this moment, have been the legal notions of our courts! How spiritless, and perhaps unjust, their interpretations of the law, had they who preside in those august tribunals derived their principles of truth, in the administration of civil and criminal justice, from the letter of the law alone! On the other hand, what grand and striking displays of the reasoning powers, what extensiveness of remark, what acumen of comparison, what a various energy of combination, mark the argument of that advocate whose mind has been illuminated by a contemplation of the hidden causes from which, as we have already remarked, laws in particular, among all other human subjects, derive their true character and complete force! Persevere, then, in this study, and you shall pluck at length a fruit which, if long in ripening, will nevertheless be truly valuable. You may not, perhaps, at first sight perceive the advantages which the perusal of history will present to you as a lawyer; but regard not this; *read on with diligence, persevere*, and, unless I am deceived, you will in the end find no reason for regret.—*Raithby.*

TWO EXAMPLES.

This is what is said of Lord Eldon, one of England's great counsellors: "He rose in the morning at four, took little

exercise, made short and abstemious meals, and sat up studying late at night, with a wet towel round his head to drive away drowsiness." And this was the son of a Newcastle coal dealer, who worked his way up from his father's office to the woolsack, where his decisions in chancery, for a quarter of a century, have enriched the equity jurisprudence of his country, and placed his name high on the roll of her distinguished chancellors. His contemporary, the celebrated English advocate, Lord Erskine, whose remarkable speeches at the bar have never ceased to be the wonder and admiration of the profession, was also a man whose great energy and determination to excel raised him from scenes of want and obscurity to the highest round in the profession, where he stands, as Lord Campbell says, without an equal as an advocate in ancient or modern times.

And need I tell you that it was by work, hard work, day by day, year in and year out, that these men ascended from the humble walks of life to the MARBLE CHAIR and the peerage? Whether before or on the bench, whether as advocates or keepers of the great seal, they enjoyed not only the esteem and confidence of their sovereign and fellow-countrymen, but that which a lawyer would prize more than all else—the *admiration* and *applause* of that venerable temple of justice, WESTMINSTER HALL. Take courage, then, young man, take courage. The great lights of the profession everywhere were once hard-struggling, brave young men, with chances no better, perhaps, than yours. Take courage; only the hard-fought battles live in history; success lies only at the end of effort. On, on with you, then, through hail and storm, through fire and flood; sweep forward with a high resolve to stand abreast with the mighty victors of the past, who have gained the summit of glory and renown!

PATIENCE AND GRIT.

When a man sets out in the pursuit of a science like that of the law he will naturally be struck with the variety and intricacy of its different branches, and, by an almost unavoidable transition, he will take a view of the extent of the talents that are necessary to their development and investi-

gation. Now, if this view be taken at the first, under the impression of self-mistrust or despondency, everything will appear in its inverted proportions. The task you have undertaken will seem to be obstructed by almost insuperable difficulties, whilst your powers dwindle away to nothing in your distempered apprehension. If, then, in the beginning of your career you find this unhappy influence coming over you, do not tamely yield to it; be not affrighted by the horrible pictures it would draw of the profundity and intricacy of the legal science; the treasures of that science are ever open to a *good understanding* and *diligent application*. At first you will, no doubt, feel yourself somewhat disgusted at the apparent dryness and repetition of the subjects of your labor; you will be apt to conceive that, however wonderfully the ends of justice may be answered by such tedious forms, those of reason are violated and overthrown. Have patience; in the course of a little time you will be induced to alter your opinion; a ground which at first you did not perceive, a reason which did not discover itself, an order, a connection which were hidden from your view, will arise gradually to your observation, and when once this important discovery is made, the confusion and irrationality that appeared to hang around your labors will disperse, the clouds of obscurity that heretofore have seemed to enwrap the legal science will depart, and **STRENGTH AND ORDER WILL APPEAR.**—*Adam's Lectures.*

THE SACRED SCRIPTURES.

The Bible forms a very natural introduction to the student's course, as recording a form of government and law originating in the Great Legislator of the universe, whose pleasure it was to enjoin, by a direct communication of his will, those duties, and declare those obligations, which, when by reasoning on the nature and relations of man we have concluded to be such, we consider as the dictates of the law of nature. The purity and sublimity of the morals of the Bible have at no time and in no country been questioned; **IT IS THE FOUNDATION OF THE COMMON LAW OF EVERY CHRISTIAN NATION.** The Christian religion is a part of the

law of the land, and, as such, should certainly receive no inconsiderable portion of the lawyer's attention. Sir William Jones says: "I have carefully and regularly perused these Holy Scriptures, and am of opinion that the volume, independently of its divine origin, contains more *sublimity*, purer *morality*, more important *history*, and finer strains of *eloquence* than can be collected from any other book, *in whatever language it may have been written.*" An American, recently writing from London, says: "A young man cannot graduate at Oxford without passing a thorough examination in the Old Testament history, the Gospels, and the Acts in their original Greek, and repeat the thirty-nine articles almost word for word. It is curious to note how familiar this makes the educated classes with the Bible. An allusion to a Scripture incident is made and understood as readily in Parliament as it would be with us in a Presbyterian Synod, and I have heard a Queen's counsel catch up such an allusion and dwell upon it in a way that showed a minute acquaintance with the very text of the Bible itself." A thorough knowledge of it will be of incalculable service to you in your practice at the bar, where most all great lawyers have felt and recognized its power; beyond and above this it may, under the benign influence of the GREAT AUTHOR of your being, become the happy means of securing success and prosperity for you in this world and a triumphal entry into the next. Remember that the *last case* you are to try will be your own; not at NISI PRIUS, not at the QUARTER SESSIONS, where you may have practised so long, but before the awful presence of the GREAT MAGISTRATE of the universe. I beseech you, then, look well to the preparation of *this case*, and see to it that *not one* of all the cases arising in your whole life's practice here can be possibly used to overwhelm and convict you there. Since your lot was so happily cast in a land of liberty, civil and religious, where the revealed law has been most thoroughly and liberally expounded, I fear you will find no recognized equity in appeals for mercy, grounded on the slightest ignorance of those pure and simple laws which have been daily before your eyes, like the sunlight of the universe.

INDOLENCE.

A habit of *indolence* is a most powerful enemy to those whose profession in life demands the utmost exertion. I mean not here to allude to that shocking intemperance of idleness which utterly precludes every hope. No man of sense is likely on a sudden, or perhaps ever, to fall into so disgraceful an inactivity. I mean that indolence which steals upon us by degrees, even while we flatter ourselves all is activity and diligence; which does not boldly rob us of our time and powers at once, but which persuades us that we are already sufficiently industrious; which is eternally whispering into our willing ears, "Now is the time for repose; you have done enough; you pursue your studies with an unnecessary attention; recreate yourself; you have a right to recreation; you have done more than is commonly done." This is the language, this is the sentiment, that beguiles us of apparently small, but really valuable, portions of time, and that defrauds us of excellence. You have taken up the profession of the law; that is the science to which your principal attention henceforth is to be directed, and excellence in it is the point towards which all the best and most vigorous faculties of your mind are to be exerted. Refuse not to labor at a settled point, and in the end you will reap the fruits of your labor. We are men, and we must bend to the conditions of mortality. The most prominent of these conditions is that we should get our bread by the sweat of our brow, and from this lot, in some degree or other, no man is exempt. But does it necessarily follow that we are, therefore, to lose every degree of spirit? Must we as a consequence give up every hope? Far from it. He whose labors are regularly directed to some certain study that may make him respectable in his own eyes and useful to the community, however he may for a moment be the derision of the wit and the contempt of the universal genius, will not only be a more happy, but a more estimable, character.

' His be the praise who, looking down in scorn
On the false judgment of the partial herd,
Consults his own clear heart, and nobly dares
To be, not to be *thought*, an honest man.'

—*Raithby.*

ONE THING AT A TIME.

The student who abandons a subject without understanding it is like a commander who leaves an enemy in his rear, he advances without the cheering certainty of being fully master of the road over which he has travelled, and most generally finds the difficulty, which he has left without overcoming, start up in the course of his progress in a hundred different shapes and a hundred different subjects to harass and perplex him.—*Hoffman*.

EXAMINATION OF WITNESSES.

An interesting witness in the hands of a ready examiner even though he be not a man of great parts, will frequently be surprised out of the truth which he has determined to hide. The multitude and variety of questions not asked, perhaps, with the exactest judgment, but running one upon the heels of another with a wonderful rapidity, amaze and frighten him; he conceives there are multitudes yet behind; he concludes that all his secrets are discovered; he confesses everything in mere despair. Not such is the influence of that advocate who, with greater mental powers, is deficient in this useful and necessary faculty; his judgment points out, with little difficulty, the questions that are proper to be asked, but by some unhappy influence he has no adequate expression at command. This very want of words produces not only hesitation, but, in the end, questions full of words, and arriving with difficulty at the proposed point.

While all this is preparing, what is the witness about? Does he suffer these immense spaces of leisure to pass unemployed? Oh, no; he is framing answers by which he may hope at once to elude confession and perplex his loitering examiner.—*Raithby*.

COKE ON LITTLETON.

It is related by Lord Campbell that when he commenced his legal curriculum he was told this anecdote: "A young

student asked Sir Vicary Gibbs how he should learn his profession. *Sir Vicary*: 'Read Coke upon Littleton.' *Student*: 'I have read Coke upon Littleton.' *Sir Vicary*: 'Read Coke upon Littleton over again.' *Student*: 'I have read it twice over.' *Sir Vicary*: 'Thrice?' *Student*: 'Yes, three times over, very carefully.' *Sir Vicary*: 'You may now sit down and make an abstract of it.' And Campbell adds: "If my opinion is of any value, I would heartily join in the same advice. The book contains much that is obsolete, and much that is altered by statutable enactment; but no man thoroughly understands the law as it is without knowing the changes it has undergone, and no man can be acquainted with its history without being familiar with the writings of Lord Coke."

MODESTY.

It is by no means a necessary consequence, because it falls to a man's lot to address a number of persons, that he is, therefore, the *wisest* man of that number. The gift of eloquence is a very noble gift, and wherever it is allied to a sound judgment it will at one time or another elevate the man who possesses it above his contemporaries; but it will only elevate him as it is manifested, and as it makes an impression upon men's minds; and nothing so effectually convinces men of the good understanding of a public speaker as the appearance of *modesty*. By this he acknowledges the inferiority of his own single opinion to the aggregate wisdom of the body he is addressing, yet because the aggregate wisdom of every society of men is a composition of separate efforts of individual understandings, he does not relinquish his own opinion, but continues to enforce it, until by some solemn act of the auditory the public opinion is clearly demonstrated.

We see that the wisest men do not advance their observations or their arguments in a tone of confidence, or with an unblushing boldness. Experience and knowledge have taught them that, like other men, they may err; still, conscious of their superiority, they take upon them to inform and instruct mankind, but their lessons are delivered in the

chastened style of modesty; they remember that they themselves have *something yet to learn*. The man who never speaks before the tribunals of justice but in the tones of confidence and audacity may excite a temporary amazement; he may delude for the moment, but when the reason of men returns he will be taught to feel that there is a dreadful distance between himself and that character which is formed to EXPOUND THE SCIENCE AND TO ELEVATE THE PROFESSION OF THE LAW. In argument, whether addressed to the judge upon the bench, or to the jury, or in the examination of witnesses, bear continually in your recollection that you are in the presence of those to whom all respect is due, who are able to distinguish, with a piercing eye, what is necessary to the completion of your character, and against whom effrontery must be no inferior offence—while they contemplate the modesty of the ingenuous advocate with sensations of benignity and pleasure.—*Raithby*.

LAW AND LAWYER.

The student will ever bear in mind that notwithstanding the word *law* is of comprehensive signification, **LAWYER** is still more so; embracing the richness and solidity of learning, the profundity of wisdom, the purity of morals, the soundness of integrity, the ornaments of literature, the amiableness of urbanity, the graces of modesty, and, generally, the decorations and amenities of life. The instructor of a law student should never cease to press upon his pupil that all the learning of the schools will not make a *great lawyer* without a sound system of morals and a nice sense of right and wrong.—*Hoffman*.

INTEGRITY.

In the course of your practice you may meet with some occasions in which, by taking advantage of the negligence or ignorance of your opponent in some particular form, you might recommend yourself to a sharp or selfish client. Here integrity will be very useful; it will not let you make of such accidents any undue or dishonest advantage; it will not suf-

for you to be so far smitten with the character of a *keen man* that you will obtain it at any rate. What, alas, will a little temporary profit avail in the estimation of a man who has been tempted, by the hope of it, to do that upon which he can reflect with no honest pride? for I again remark that, even in point of profit, this sharp, this catching spirit, does not always, in the end, bear away the palm. Like the bubbling of a disturbed rivulet, it may excite a momentary attention, while the noble, silent swell of the river passes unnoticed; but, like the rivulet, its shallowness will presently be discovered; we shall turn from it with contempt, content only with that perennial stream of talent and integrity that is rolling on with a majestic and unruffled course towards the great ocean of immortality. The advocate who is influenced by *integrity* will never forget that the cause of his client is his own; this is a happy consequence of that animating principle. What a glow, what a fervor does it impart to every look and every action! And is it not as much to his interest as his honor? Men are charmed when they find their business thus warmly undertaken. When they perceive that everything they themselves could think is said for them, they are led insensibly into the idea that the lawyer perceives, and is affected by, the justice of their cause. If this be a delusion, it is a delusion that is most readily supported by their self-complacency; and the name of that lawyer is presently spread in the world who appears to argue rather from the affection he has towards the cause of his client than from LOVE OF THE GOLDEN FEE.—*Raithby*.

FOUR WAYS.

We are told by Lord Campbell that “it used to be said that there were four, and only four, ways in which a young man could get at the bar: 1. By *huggery*. 2. By writing a law book. 3. By Quarter Sessions. 4. By a miracle. The first was successfully practised by that great *nisi prius* leader, Tom Teweekesbury, who not only gave dinners at his chambers to the attorneys, but suppers to their clerks.” “The miracle,” says Campbell, “consists in the conjunction of an opportunity to make a great speech in some very

popular cause, with full ability to improve the advantage." Perhaps the most remarkable instance in the miracle way is that furnished us by the great Erskine. "Living in small lodgings, dressed shabbily, and subsisting on 'cow-heel and tripe,' he was suddenly to be the idol of all ranks of the community, and to wallow in riches. Such a quick transition from misery to splendor is only equalled in the Arabian Nights, when the genii of the wonderful lamp appeared, to do the bidding of Aladdin. A sunrise within the tropics displays some fleeting crepuscular tints between utter darkness and the full solar blaze, and, therefore, cannot be used to give a just notion of Erskine's first appearance to the dazzled eyes of the British public." His reputation was made in his first case—*The King v. Baillie*. "The impression made upon the audience by his address is said to have been unprecedented, and I must own that, all the circumstances considered, it is the most wonderful forensic effort of which we have any account in our annals. It was the *debut* of a barrister, just called and wholly unpractised in public speaking, before a court crowded with men of the highest distinction. He came after four eminent counsel, who might be supposed to have exhausted the subject. He was called to order by a venerable judge, Lord Mansfield, whose word had been law in that hall above a quarter of a century. A commonplace declaimer would have thought it necessary to conclude with some noisy, mouthing sentences. How much more effective must have been the lowered tones of the man who knew instinctively how much to touch the feelings, speaking in an assembly where every look was fixed upon him, where every syllable he uttered was eagerly caught up, where breathing was almost suspended, and as often as he paused a flake of snow would have been heard to fall.

"Briefs and fees, large and small, now flowed in a continual stream into the chambers of the counsellor who had so astonished the world. He was at once in full business, and it should be recorded, for the honor of the 'long robe,' that although he passed over the heads of many who had fully established themselves in Westminster Hall, there was no caballing against him; he had not even to encounter envy

or ill-will; he was hailed by his competitors *as conferring new honors upon them*; and, bearing his faculties most meekly, he became and ever continued a favorite with all ranks of the profession."

DO NOT BE IN HASTE.

I would here warn you against a very prevalent delusion. Is it not common for young men to say, "What is the use of studying so much beforehand? Cannot I acquire the learning as I want it? Does not every case carry its own law?" Depend upon it, such reliance upon future opportunities will deceive you. Should your mind be unversed in general doctrines, you will find unexpected difficulties in the search for particular examples, as well as in the application of them. We daily see men at the bar with a respectable share of book-learning—nay, with no small degree of a certain sort of talent for eloquence—and yet we venture to pronounce secretly of these men that they will never soar above mediocrity. This is a sort of feeling which rests satisfied with its own prophetic certainty, and, therefore, the reasons that produce it are seldom analyzed; but should the question be asked, the answer would in a moment doubtless be: "He has been in **TOO GREAT HASTE**; he knows nothing of the world or himself."—*Raithby*.

SELECTION OF BOOKS.

If a man should calculate on living to the age of sixty years, and should appropriate with great industry forty of these years to the study of books, the most that could be accomplished in this time would be the perusal of about *sixteen hundred* octavo volumes of *five hundred* pages each. What is this number compared with the millions of volumes out of which he has to select! How important is it, therefore, that the choice should be judicious, and that, after it is made, the whole should be studied with method; and how much more necessary it is to those who, instead of forty years' devotion to books, appropriate not more than a fourth part of that period. Lord Bacon has quaintly observed:

“Some books are to be tasted, others to be swallowed, and some few to be chewed and digested—that is, some books are to be read only in part, others to be read, but not curiously, and some few to be read wholly, and with diligence and attention.”—*Hoffman*.

DEPORTMENT.

Manner is that invisible quality which insensibly pervades, with the happiest effect, the works of pure genius. It animates the pencil of the artist, the pen of the poet, and the sentiments of the orator; it spreads an inexpressible glow of charms over every effort of art; it communicates a peculiar sweetness to the keenest truths, an air of majesty to the simplest figures. It allures while it awes the mind; it speaks a language that no power but itself can express, and it is that Attic fire that enlivens every object to which it communicates its influence.

In the advocate it is more immediately discerned than in any other character; consequently, in him the want of it will more easily be detected. How shall we express what this manner is? It appears to be a quality arising from some internal influence, and cannot therefore, perhaps, be absolutely acquired; but that it may be improved appears by the same reason that governs the improvement of all similar qualities, and by the same means. It communicates itself by a thousand mediums to the action of the speaker, even in the most minute particulars; it may be seen in the countenance, in the movement of a finger, yet it cannot be well designated by any single action. It is felt in the tones of the voice; yet any particular sort of expression will not be adequate to the description of it. It is an indescribable combination of ease and dignity; it mixes with and elevates the character without seeming to form any denominate part of it. It is of a dignified nature, and is the result only of a penetrating judgment, a refined and enlarged sentiment, a superior virtue and an extensive commerce with mankind. Thus is the rarity of its appearance in the world accounted for. Has nature favored you with the materials? Improve them by studying the exalted principles of truth.—*Raithby*.

A CHIEF JUSTICE.

It will be no loss of time for the student to pause for a moment to read the following sketch of the illustrious John Jay, first Chief Justice of the United States. Doubtless it will convince you that to be a great lawyer, statesman, or judge, manifestly means something more than to be greatly learned. According to the English system of conferring titles of nobility, it is possible that our plain, republican John Jay would have lost his family name when he became Chief Justice, and we should probably read of him now as the noble Lord Bedford. But no title of nobility could add any lustre to his name. No royal patent could make him nobler than he was. His deportment was tranquil and unassuming, and one who had met him, not knowing who he was, would not have been led to suppose that he was in the presence of one eminently gifted by nature with intellectual power, and who had sustained so many offices of high trust and honor. Mr. Jay's character is disclosed in the record of his life. His moral and intellectual qualities were in harmony. His public principle commanded the respect of the world. His private virtues attracted the affection and homage of his friends. He was modest, claimed no merit, assumed no importance, and seldom alluded to the great events of his life. He was charitable, not impulsively bestowing his means without discrimination, like Goldsmith's village preacher, whose "pity gave ere charity began," but with a judicious selection, and from a sense of duty. His economy was exact, but liberal. "A wise man," he said, "has money in his head, but not in his heart." The recipients of his bounty were numerous. He had an elevated sense of justice and of the claims of humanity. His religion was a part of his being, and displayed itself in the uniform tenor of his life. He acted under the habitual conviction of accountability. "All his serious thoughts had rest in heaven." His feelings were always under the control of his will, and hence he was never guilty of those extravagances of conduct which too often mar the career of genius. He was tenacious in his

friendships, and equally so, we suspect, in his enmities. Having once had good cause to doubt a man's sincerity or integrity, he never after trusted him. His disposition was cheerful, his conversation equally instructive and interesting.

His intellectual endowments are easily described. His mind was vigorous, exact, and logical. To genius he could make no pretensions. Judgment—discriminative, penetrating—was the characteristic of his understanding. If over his other faculties imagination had presided, the compass of his thought would have been enlarged, and grace and flexibility been imparted to his mind. Jay was not a variously learned man. Modern genius did not delight him. Of the ancients, Cicero was his favorite. The Bible was his constant study. Observing throughout his life the great principles of justice and rectitude, he “ascended to the temple of honor through the temple of virtue.”—*Flanders' Lives of the Chief Justices*.

URBANITY

Those who have written upon the decorations of life have agreed to mark *urbanity* as the chief amongst them. Its good effects are conspicuous in every movement, in every word, in every action; it possesses an engaging condescension that adds fresh lustre to the dignity of our manners; it softens the tone of the voice and relaxes the awful countenance of wisdom. In addressing the judge or jury it will give at once an elegant and respectful air to every sentiment; in arguing with a learned friend it will produce a tone of yielding diffidence, without impairing the firmness or blunting the point of our conclusion; in examining a witness it will guard us against *insulting the humble* or *deriding the modest*; it will clothe the countenance with a pleasing seriousness when undesigning ignorance only presents itself; to the crafty and audacious it will exhibit an aspect adverse and terrific in the highest degree. Thus will urbanity raise up a character that will prove obnoxious to those only to whom virtue and elegance are obnoxious. It may appear ludicrous to class urbanity among the serious studies of the

lawyer; but if it be a trifling thing, it may be recollected that upon things thus lightly esteemed the most important occurrences of life have depended—important both in their own intrinsic nature and in the consequences they have produced.—*Raithby*.

POINTS TO BE OBSERVED IN PRACTICE.

The freedom of speech allowed to counsel, in conducting the cases of their clients, is manifestly indispensable for the administration of justice. It is, however, a weapon which ought never to be wielded but by a GENTLEMAN, who will cautiously keep in view the true reason of the existence of the right, and be governed, in exercising it, by uniform delicacy and considerateness. It is, however, a matter entirely within his own discretion. If *real* vice, fraud, falsehood, cruelty, meanness, or oppression, are to be denounced, let it be done fearlessly, and with all the power and eloquence which the advocate may be able to command; but still let him remember the character which he has individually to sustain, and the dignity of that profession of which he has become a member. To indulge in unbridled license of speech simply because one has the *power* of doing so—under the shelter then, surely, of a most ignominious impunity—is inexpressibly brutal, mean, and cowardly, and proves him who is guilty of it to have no pretensions whatever to the title of gentleman. One should bear in mind the agony which one may be inflicting, in every word that is uttered, upon a person possibly of spotless integrity, of the highest delicacy of feeling—whose conduct one may have totally misunderstood, of whose real motives one is altogether ignorant, yet is recklessly endeavoring to expose such a person to the ridicule, scorn, and hatred of his friends and the public—to inflict upon his character injury irreparable. Let not, however, the insolent speaker imagine that he always *succeeds* in doing this; he is far more likely to render the victim of his vituperation an object of sympathy, and earn for himself the character of a hard-mouthed bully—one who is despised by the *gentlemen* who belong to the profession which he is dishonoring, and by

those who sit upon the bench. You should also be uniformly respectful, but never servile, to the court. Be *firm*, if you please, but approach not the confines of flippancy, familiarity, or presumption. A rebuke under such circumstances will be justly galling and humiliating. The ear of the court is gained by modesty, and by speaking briefly and to the point. It is closed against assurance, volubility, prolixity, repetition. How disgusting and intolerable is it to hear a man going doggedly over ground already gone over, as if the judges had not heard or understood your senior; as if there were no other case to be heard but your own; as if you were not the subject of the "curses, not loud but deep," of those whom you keep waiting to be heard in their own cases, possibly of far greater importance than that with which you are pestering the court *ad nauseam*! Observe how differently the court listens to a sinner of this sort, and to a man who has earned the character of being brief and lucid. Do not give up too easily; but the accursed pertinacity which you may occasionally see exhibited—look at the faces of the judges while suffering under the infliction! Be courteous to your opponents. When you find you are *being beaten*, then is the moment to guard against the least manifestation of a ruffled temper, of irritability, or snappishness, or downright ill-humor. It will provoke only laughter or dislike. 'Tis at this pinching point that you may infallibly distinguish between the temper and breeding of different men, between the man well-bred and him under-bred or ill-bred. A gentleman is a gentleman to the end of the chapter. Never take offence at what is said or done by your opponent, unless you deliberately believe that *offence was intended*. If that be the case, you must act as your own sense of self-respect may prompt, with spirit, but prudence. Never permit yourself to speak in a disparaging tone of any of your brethren in the presence of clients. If you cannot praise, be silent. Do not expose a slip or error, but, if possible, and consistent with your duty to your own client, conceal that slip or error as you would wish your own to be concealed.—*Warren's Law Studies*.

SHORT AND SHARP.

The minds of very few men are patient of a long or thorough investigation, even where the thing in contemplation requires it; much less will it be borne where the determinate quality of the subject is lightness or velocity. For this reason I have seen much impatience in a court, where a man of superior understanding, but of a deliberate turn, and slow of speech, has been many minutes gravely combatting the trivial position of some artful adversary, who, though his inferior in every other respect, knew he could conquer him in this. In such a case, to what end served his profundity? However valuable it might be on other occasions, at this moment no man attended to it but with pain and reluctance; when ten words of a gay and lively import would have abashed his adversary and procured him a triumph, five hundred have been uttered with prodigious labor, only to produce him vexation and defeat.—*Raithby*.

THE END.

And now, as a parting word of advice, let me ask the student to bear in mind what Hamlet says in the following expressive lines. Remember that after your professional career is ended, and your final exit made, however eminent you may have been while living, it is possible that some unfeeling grave-digger may bang your skull without *battery*, and jestingly proclaim you an *outlaw*:

“Why may not that be the skull of a lawyer? Where be his quiddits now, his quilllets, his cases, his tenures, and his tricks? Why does he suffer this rude knave now to knock him about the sconce with a dirty shovel, and will not tell him of his action of *battery*? Humph! This fellow might be in’s time a great buyer of land, with his statutes, his recognizances, his fines, his double vouchers, his recoveries. Is this the fine of his fines, the recovery of his recoveries, to have his fine pate full of fine dirt? Will his vouchers vouch him no more of his purchases, and double ones too, than the length and breadth of a pair of indentures? The very conveyances of his lands will hardly lie in this box; and must the inheritor himself have no more? ha!”



LAW TERMS AND MAXIMS.

A

A fortiori. By so much the stronger; by a more powerful reason.

A mensa et thoro. "From bed and board." A divorce between husband and wife which does not make the marriage void **ab initio**, or from the beginning.

A prendre. To take; to seize.

A priori. From the former.

A verbis legis non est recedendum. From the words of the law there should be no departure.

A vinculo matrimonii. From the bond of marriage.

Ab initio. From the beginning.

Ab origine. From the beginning.

Absoluta sententia expositore non indiget. An absolute, unqualified sentence, or proposition, needs no expositor.

Actio accrevit. An action has accrued.

Actio personalis moritur cum persona. A personal action dies with the person.

Actor sequitur forum rei. The plaintiff must follow the forum of the thing in dispute.

Actus curiæ neminem gravabit. An act of the court shall prejudice no man.

Actus Dei neminem facit injuriam. The act of God does wrong to no one—i. e., no one is responsible in damages for inevitable accidents.

Ad finem litis. To the conclusion of the suit.

Ad idem. "To the same." To the like intent.

Ad infinitum. "To eternity." To the utmost.

Ad inquirendum. To make enquiry.

Ad libitum. At pleasure; at will.

Ad litem. To (or in) the suit (or controversy).

Ad sectam. At the suit of.

Administrator de son tort. Administrator in his own wrong.

Æquitas agit in personam. Equity acts upon the person.

Æquitas sequitur legem. Equity follows the law.

Affectio tua nomen imponit operi tuo. Your motive gives a name to your act.

Affirmantis est probatio. He who affirms must prove.

Alias ca. sa. Another writ to take (the person), to make satisfaction.

Alias scire facias. "That you again cause to be informed." A second writ of **scire facias**.

Alibi. "In another place."

Alibi natus. Born in another place.

Aliud est celare, aliud tacere. To conceal is one thing, to be silent another.

Allegari non debuit quod probatum non relevat. That ought not to be alleged which, if proved, would not be relevant.

Ancient demesne. An ancient inheritance.

Animo furandi. With intent to steal.

Animo lucrandi. With intention to gain a profit.

Animalia feræ naturæ. Animals of a wild nature.

Animus hominis est anima scripti. The intention of the party is the soul of the instrument.

Apices juris non sunt jura. Legal niceties are not laws.

Assumpsit. He undertook (or promised).

Assumpsit pro rata. He undertook agreeably to the proportion.

Autre droit. Another's right.

B

Banco. "In bench." As "**dies in banco**," or days in which the court sits.

Bancus ruptus. "A broken bank." From which the word bankrupt.

Baron et feme. The husband and wife.

Benignius leges interpretandæ sunt quo vol-

- untas carum conservetur.** Laws are to be more favorably interpreted, that their intent may be preserved.
- Billa vera.** A true bill. .
- Bona fide.** In good faith.
- Bona fides exigit ut quod convenit fiat.** Good faith demands that what is agreed upon shall be done.
- Bonus.** A consideration given for what is received; a premium paid to a grantor or vendor.

C

- Capias.** "You may take." A writ authorizing the defendant's arrest.
- Capias ad computandum.** That you take (defendant) to make account.
- Capias ad respondendum.** That you take (defendant) to make answer.
- Capias ad satisfaciendum.** That you take (defendant) to make satisfaction.
- Capias ad valentiam.** That you take to the value.
- Capias in withernam.** That you take a reprisal.
- Capias pro fine.** That you take for a fine.
- Causa causans.** The moving cause.
- Causa impotentiae.** On account of impotence.
- Causa causae est causa causati.** The cause of a cause is the cause of the effect.
- Causa mortis.** On account of death; in prospect of death.
- Casus foederis.** A cause which comes within the terms of a compact.
- Caveat.** That he beware; a warning.
- Caveat emptor.** Let the purchaser beware.
- Caveat venditor.** Let the seller beware.
- Cepi corpus.** I have taken the body.
- Certiorari.** "To be certified of; to be informed of." A writ directing the proceedings or record of a cause to be brought before a superior court.
- Cessante causa, cessat effectus.** The cause ceasing, the effect must cease.

- Cestui que trust.** A person for whose use another is seized of lands, etc.
- Cestui que use.** A person for whose use land, etc., is given or granted.
- Cestui que vie.** A person for whose life a gift or grant is made.
- Chose in action.** A thing in action.
- Clausum fregit.** He broke the close or field.
- Commodum ex injuria sua non habere debet.** No man ought to derive any benefit of his own wrong.
- Compensatio criminis.** A compensation for crime.
- Compos mentis.** "Of sound mind." A man in such a state of mind as to be qualified legally to sign a will or deed, etc.
- Contra bonos mores.** Against good morals.
- Contractus legem ex conventionione accipiunt**
The agreement of the parties makes the law of the contract.
- Conventio vincit legem.** The agreement of the parties overcomes or prevails against the law.
- Corpora cepi.** I have taken the bodies.
- Covert.** Married.
- Crim. con.** Illicit connection (adultery).
- Cuilibet in arte sua perito est credendum.**
Credence should be given to one skilled in his peculiar art.
- Cujus est solum ejus usque ad cœlum.** He who owns the soil owns it up to the sky.
- Culpa lata dolo æquiparatur.** Gross neglect is equivalent to fraud.
- Currit tempus contra desides et sui juris contemptores.** Time runs against the slothful and those who neglect their rights.
- Cy pres.** By approximation.

D

- Damage feasant.** Doing damage.
- Data.** "Things granted." We must proceed on certain

"data"—that is, on matters previously admitted to be correct.

Datum. A thing granted; a point fixed upon; a first principle.

De bene esse. Conditionally.

De bonis non. Of goods not (administered).

De bonis non administrandis. Of goods unadministered.

De die in diem. From day to day.

De facto. Of the deed; in fact.

De gratia. As a matter of grace or favor.

De jura judices, de facto juratores, respondent.
The judges answer concerning the law, the jury concerning the facts.

De jure—de facto. "From the law; from the fact."
Sometimes an offender is guilty the moment the wrong is committed, then he may be said to be guilty "**de facto**."
In other cases he is not guilty until he be convicted by law; then he is guilty "**de jure**."

De minimis non curat lex. The law does not notice trifling matters.

De novo. Anew; afresh.

De præsentī. Of the present time.

De son don. Of his gift.

De son tort. "Of his own wrong." This was part of a plea very similar to *son assault demesne*.

Debet et detinet. He owes and detains.

Debet quis juri subjacere ubi delinquit. Every one ought to be subject to the law of the place where he offends.

Debile fundamentum, fallit opus. Where there is a weak foundation the work falls.

Defeasance. A conditional undertaking to annul the effect of a bond, etc.

Delegata potestas non potest delegari. A delegated authority cannot be again delegated.

Delictum. A fault, offence, or crime.

Detinet. He keeps. He detains.

Detinuit. He has detained.

Deus solus hæredem facere potest, non homo.

God alone, and not man, can make an heir.

Devastavit. He wasted.

Devastavit nolens volens. He wantonly (or wickedly) committed waste.

Dicta. Sayings; remarks; observations.

Dies dominicus non est juridicus. Sunday is not a day in law.

Discretio est discernere per legem quid sit justum. Discretion is to discern through law what is right.

Distringas. That you distrain.

Divinatio non interpretatio est, quæ omnino recedit a litera. It is a guess, not interpretation, which altogether departs from the letter.

Dolus circuitu non purgatur. Fraud is not purged by circuitry.

Domesday, or Domesday Book. A book showing the tenures, etc., of most of the lands in England in the time of William the Conqueror.

Dominium non potest esse in pendent. The right of property cannot be in abeyance.

Donatio. A gift; a donation.

Dormiunt aliquando leges, nunquam moriuntur. The laws sometimes sleep, but never die.

Droit des gens. The law of nations.

Duces tecum. "That you bring with you." A subpoena, so called, when the person is commanded to produce books, papers, etc., to the court and jury.

E

E converso. On the other hand; on the contrary.

Eat sine die. Let him go without day (or be discharged).

Elegit. "He has chosen." A judicial writ directed to the sheriff, empowering him to seize one moiety of the defendant's lands for damages recovered.

En ventre sa mere. In the womb.

Enciente. Pregnant

Enumeratio unius est exclusio alterius. Specification of one thing is an exclusion of the rest.

Error coram nobis. Error (lying) before us.

Error coram vobis. Error before you.

Error nominis nunquam nocet, si de identitate rei constat. Mistake in the name never injures, if there is no doubt as to the identity of the thing.

Error scribentis nocere non debet. An error made by a clerk ought not to injure; a clerical error may be corrected.

Eruditus in lege. "Learned in the law;" a counsel.

Escrow. A deed or writing left with another, to be delivered on the performance of something specified.

Estoppel. "A stop;" a preventive plea.

Estovers. Wood cut from a farm by the tenant which, by the common law, he has a right to use on the estate for necessary purposes.

Et ad huc detinet. And he still detains.

Et non alibi. And in no other place.

Ex æquo et bono. In equity and good conscience.

Ex contractu. By way of agreement.

Ex curia. Out of court.

Ex delicto. By (or from) a fault or offence.

Ex dolo malo non oritur actio. A right of action cannot arise out of fraud.

Ex facto. From (or by) the deed.

Ex justa causa. For a good reason (or cause).

Ex lege. An outlaw.

Ex nudo pacto non oritur actio. No action arises on a contract without a consideration.

Ex officio. Officially; by virtue of the office.

Ex parte materna. On the part of the mother.

Ex parte paterna. On the part of the father.

Ex parte querentis. On the part of the plaintiff.

Ex post facto. From (or by) an after act.

Ex relatione. "By (or from) relation." Sometimes the words mean "by the information."

Ex tempore. Off hand (without delay or premeditation).

Ex tota materia emergat resolutio. The construction or explanation should arise out of the whole subject-matter.

Ex visitatione Dei. From the visitation of God.

Exceptio probat regulam de rebus non exceptis. An exception proves the rule concerning things not excepted.

Executor de son tort. "An executor of his own wrong;" one who acts illegally in the office.

Exoneretur nunc pro tunc. Let him (or it) be now discharged, instead of at some past time.

Expressa nocent, non expressa non nocent. Things expressed may be prejudicial; things not expressed are not.

F

Fac simile. Do the like; a close imitation.

Facias. That you do (or cause to be done).

Factum negantis nulla probatio. No proof is incumbent on him who denies a fact.

Factum unius alteri nocere non debet. The deed of one should not hurt another.

Falsa demonstratio non nocet. A false description does not vitiate.

Falsare curiam. To deceive the court.

Falsus in uno, falsus in omnibus. False in one thing, false in everything.

Felo de se. A suicide; a self-murderer.

Feme covert. A married woman.

Feme sole. An unmarried woman.

Feme sole sub modo. A single woman to a certain extent.

Feoffare. To enfeoff or grant in fee.

Feudum. A fee; land held in fee simple.

Fiat. Let it be done.

Fiat justitia ruat cœlum. Let justice be done though the heavens should fall.

Fictio legis neminem lædit. A fiction of law injures no one.

rief. "A fee." What we call a fee is, in other countries, the contrary to **chattels**. In Germany certain districts or territories are called "**fiefs**," where there are **fiefs** of the Empire.

Fieri. To be made or done.

Fieri facias. That you cause to be made or done, or levied. A writ of execution, so-called.

Flotsam. Goods floating on the sea.

Forma legalis. A legal form.

Forum. A court or place of justice.

Frank-almoign. A free gift.

Fraus est celare fraudem. It is fraud to conceal fraud.

Fraus est odiosa et non præsumenda. Fraud is odious and not to be presumed.

Furiosi nulla voluntas est. A madman has no will.

Furiosus solo furore punitur. A madman is punished by his madness alone.

G

Gavel-kind. A peculiar tenure of land.

Generale nihil certum implicat. A general expression implies nothing certain.

Guardian ad litem. A guardian in the suit.

H

Habeas corpora. That you have the bodies.

Habeas corpus. "That you have the body." The great writ of the people's liberty.

Habeas corpus ad respondendum. That you have the body to answer.

Habeas corpus ad satisfaciendum. That you have the body to make satisfaction.

Habeas corpus ad testificandum. That you have the body to give evidence.

Habeas corpus cum causa. That you have the body with the cause (why he is arrested).

Habendum et tenendum. To have and to hold.

Habere facias possessionem. That you cause to take possession.

Habere facias seisinam. That you cause to have the possession.

Hæredum appellatione veniunt hæredes hæredum in infinitum. By the title of heirs come the heirs of heirs to infinity.

Hæres hæredis mei est meus hæres. The heir of my heir is my heir.

Hominum causa just constitutum est. Law is established for the benefit of man.

I

Id certum est quod certum reddi potest. That is certain which may be rendered certain.

Idem dies. The same day; a like day.

Idem est facere, et nolle prohibere cum possis. It is the same thing to do a thing as not to prohibit it when in your power.

Ignoramus. "We are ignorant." A word written on a bill of indictment when the evidence is insufficient to put the accused on his trial.

Ignorantia facti excusat, ignorantia juris non excusat. Ignorance of facts excuses; ignorance of law does not excuse.

Ignorantia legis neminem excusat. Ignorance of law excuses no one.

Imparlance. A time granted by the court for the defendant to plead.

Impossibilium nulla obligatio est. There is no obligation to perform impossible things.

Impotentia excusat legem. Impossibility is an excuse in the law.

In articulo mortis. At the point of death.

In autre droit. In right of another.

In banco regis. In the King's Bench.

In capite. In chief. Lands held "**in capite**" are those held of the chief lord of the fee.

In colloquio. In a discourse.

In criminalibus, probationes debent esse luce clariores. In criminal cases the proofs ought to be clearer than the light.

In delicto. In an offence, or in default.

In dominio suo. In his demesne or lordship.

In dorso. On the back.

In dubiis. In doubtful cases.

In esse. In being.

In extenso. At large; to the extent.

In extremis. In the last moments; near death.

In infinitum. To infinity; time without end.

In invitum. Against an unwilling party, by operation of law.

In jure non remota causa, sed proxima spectatur. In law the proximate, and not the remote, cause is to be looked to.

In loco parentum. In the place of the parents.

In maleficiis voluntas spectatur non exitus. In offences the intention is regarded, not the event.

In mortua manu. In mortmain; in a dead hand or possession.

In omnibus obligationibus, in quibus dies non ponitur, præsentì die debetur. In all obligations, when no time is fixed for the payment, the thing is due immediately.

In pais. In the country.

In pari delicto. In a like offence (or crime).

In pari delicto melior est conditio possidentis. When the parties are equally in the wrong, the condition of the possessor is better.

In presenti. At the present time.

In proprio jure. In (his) proper (or peculiar) right.

In propria persona. In his own person; in personal attendance.

In re. In the matter of.

In re dubia magis inficiatio quam affirmatio intelligenda. In a doubtful matter the negative is to be understood rather than the affirmative.

In rem. To or against the property; to the point.

- In rerum natura.** In the nature (or order) of things.
- In stirpes.** To the stock or lineage.
- In suo jure.** In his own right.
- In terrorem.** By way of terror (or warning).
- In toto.** In the whole; altogether; entirely.
- In transitu.** "In the passage." Merchandise is said to be "**in transitu**" while on its way to the consignee.
- In vadio.** In pledge.
- In ventres a mere.** In its mother's womb
- Incipitur.** It is begun.
- Infeudare.** To enfeoff; grant in fee.
- Injuria non excusat injuriam.** A wrong does not excuse a wrong.
- Injuria propria non cadet in beneficium facientis.** No one shall profit by his own wrong.
- Inscriptum.** An endorsement.
- Intentio mea imponit nomen operi meo.** My intent gives a name to my act.
- Inter mœnia.** Within the walls; within the domicile.
- Inter nos.** Between ourselves—that is (**inter nos**), to keep a secret.
- Interpretatio fienda est ut res magis valeat quam pereat.** Such a construction is to be made that the subject may have an effect rather than none.
- Interregnum.** A space between two reigns.
- Interregnum quare clausum fregit?** In the meantime, why did he break the close?
- Ipso facto.** By the fact itself; positively.
- Ipso jure.** By the law itself, or by that right.
- Ira furor brevis est.** Anger is a short insanity.
- Ita lex scripta.** So the law is written.

J

- Jetsam.** Goods thrown into the sea.
- Judex æquitatem semper spectare debet.** A judge ought always to regard equity.
- Judici officium suum excendenti non paretur.**

To a judge who exceeds his office or jurisdiction no obedience is due.

Judicis est jus dicere non dare. It is the duty of a judge to declare the law, not enact it.

Judicia posteriora sunt in lege fortiora. The latter decisions are stronger in law.

Jura in re. Rights in the matter or thing.

Jura personarum. The rights of persons.

Jura publica ante ferenda privatis. Public rights are to be preferred to private.

Jura rerum. The rights of things.

Juratores sunt judices facti. Jurors are the judges of the facts.

Jure divino. By right divine.

Jure gentium. By the law of nations.

Jure humano. By human law (or right).

Jure mariti. In right of the husband.

Jure naturæ. By the law of nature.

Jure uxoris. In right of the wife.

Jus ad rem. A right to the property.

Jus civile. The civil (or municipal) law.

Jus ex injuria non oritur. A right cannot arise from a wrong.

Jus in re. The right in the property.

Jus suum. His own right.

Iustitia non est neganda, non differenda. Justice is not to be denied nor delayed.

L

Laches. Neglect; supineness.

Lata culpa dolo æquiparatur. Gross negligence is equal to fraud.

Leges posteriores priores contrarias abrogant. Subsequent laws repeal prior conflicting ones.

Levari facias. That you cause to be levied.

Levari facias de bonis. That you cause to be levied of the goods.

Lex dilationes semper exhorret. The law always abhors delay.

Lex est dictamen rationis. Law is the dictate of reason.

Lex est norma recti. Law is a rule of right.

Lex fori. The law of the court.

Lex neminem cogit ad vana seu inutilia peragenda. The law forces no one to do vain or useless things.

Lex nemini facit injuriam. The law does wrong to no one.

Lex non scripta. The unwritten or common law; that which has been received from time immemorial by tradition.

Lex scripta. The written or statute law.

Lex semper dabit remedium. The law will always give a remedy.

Lex semper intendit quod convenit rationi. The law always intends what is agreeable to reason.

Lex talionis. The law of requital in kind. "An eye for an eye," etc., as in the Mosaic law.

Lex uno ore omnes alloquitur. The law speaks to all with one mouth.

Libelli famosi. Libels; infamous writings.

Libellus sine scriptis. An unwritten libel.

Liber homo. A free man.

Liberari facias. That you cause to be delivered.

Loco parentis. In the place of the parent.

Locus contractus regit actum. The place of the contract governs the act.

Locus penitentiae. A place of repentance; a power of drawing back from a contract or bargain before any act is done to confirm it in law.

L. S.—Locus sigilli. The place of the seal.

Longa patientia trahitur ad consensum. Long sufferance is construed as consent.

Longa possessio est pacis jus. Long possession is the law of peace.

M

Magna Charta. The great Charter. The bulwark of English liberty.

Magna culpa dolus est. Great neglect is equivalent to fraud.

Mahemium est homicidium inchoatum. Mahem is incipient homicide.

Majori summæ minor inest. The lesser is included in the greater.

Mala fide. In bad faith; with intent to deceive.

Mala prohibita. Wrongs forbidden (by common law).

Malfeasance. Doing wrong; a bad act.

Malo animo. With bad intentions.

Malum in se. Bad in itself; wrong in its own nature.

Malum prohibitum. A prohibited offence.

Mandamus. "We command." A peremptory writ, issued for many purposes.

Manu forti. With a strong hand; by violence.

Matrimonium subsequens tollit peccatum præcedens. A subsequent marriage cures preceding criminality.

Melior est causa possidentis. The cause of the possessor is preferable.

Melior est conditio defendentis. The cause of the defendant is the better.

Mesne. "Middle; intervening." The middle between two extremes, and that either in time or dignity.

Misfeasance. A misdeed.

Modo et forma. In manner and form.

Modica circumstantia facti jus mutat. A small circumstance attending an act may change the law.

Mortmain — Manus mortua. A dead hand or an unchangeable possession.

Mutatis mutandis. The necessary changes.

N

Narratio, often abbreviated **Narr'**. A declaration; a count.

Naufrage. Shipwreck.

Nemo contra factum suum venire potest. No man can contradict his own deed.

Nemo debet rem suam sine facto aut defectu suo amittere. No one should lose his property without his act or negligence.

Nemo est hæres viventis. No one is an heir to the living.

Nemo ex proprio dolo consequitur actionem. No one acquires a right of action from his own wrong.

Nemo plus juris alienum transferre potest, quam ipse habet. One cannot transfer to another a larger right than he himself has.

Nemo potest facere per obliquum quod non potest facere per directum. No one can do that indirectly which cannot be done directly.

Nemo tenetur se ipsum accusare. No one is bound to accuse himself.

Nihil debet. He is not indebted.

Nihil dicit. He says nothing.

Nihil habet forum ex scena. The court has nothing to do with what is not before it.

Nihil quod est contra rationem est licitum. Nothing against reason is lawful.

Nil debet. "He owes nothing." The usual plea in an action of debt.

Nil debit in assumpsit. He is not indebted in (the action of) assumpsit.

Nil dicit. He says nothing.

Nolle prosequi. "To be unwilling to proceed." Generally used in criminal cases when further proceedings are discontinued.

Non cepit. He did not take.

Non compos mentis. Not of sound mind; in a delirium of lunacy.

Non damnificatus. Not damnified; not injured.

Non deberet alii nocere, quod inter alios actum esset. No one ought to be injured by that which has taken place between other parties.

Non debet. He does not owe.

Non deceptitur qui scit se decipi. He is not deceived who knows himself to be deceived.

Non differunt quæ concordant re, tametsi non in verbis iisdem. Those things which agree in substance, though not in the same words, do not differ.

Non est inventus. "He is not found." The return made by a sheriff when the defendant is not found in his county.

Non est regula quin fallat. There is no rule but what may fail.

Non omne damnum inducit injuriam. Not every loss produces an injury.

Non pros'. He will not prosecute.

Non prosequitur. He does not proceed; he is non-suited.

Non refert an quis assensum suum præfert verbis, an rebus ipsis et factis. It is immaterial whether a man gives his assent by words or by acts and deeds.

Non refert quid notum sit judici, si notum non sit in forma judicii. It matters not what is known to the judge, if it is not known to him judicially.

Non refert verbis an factis fit revocatio. It matters not whether a revocation be by words or by acts.

Non sum informatus. I am not informed; I am ignorant.

Non tenuit. He did not occupy (or hold).

Nonfeasance. Non-performance.

Nuda pactio obligationem non parit. A naked promise does not create an obligation.

Nudum pactum. A bare (or naked) contract; one not binding in law.

Nul assets ultra. No further effects.

Nul tiel corporation. No such corporation.

Nul tiel record. "No such record." This is a part of the plaintiff's rejoinder, that there is no such record, where the defendant alleges matter of record in bar of the plaintiff's action.

Nul tort. "No wrong." A plea in a real action that no wrong was done, and is a species of the general issue.

Nulla bona. No effects.

Nullus videtur dolo facere qui suo jure utitur.

No man is to be esteemed a wrong-doer who avails himself of his legal right.

Nunc pro tunc. "Now for that time." These words are frequently used, in legal or equitable proceedings, where something is permitted to be done "**eo instanti**" which should have been performed some time before.

Nunquam res humanæ prospere succedunt ubi negliguntur divinæ. Human things never prosper when divine things are neglected.

O

Omne actum ab intentione agentis est judicandum. Every act is to be estimated by the intention of the doer.

Omne sacramentum debet esse de certa scientia. Every oath ought to be founded on certain knowledge.

Omnes licentiam habere his quæ pro se indulta sunt, renunciare. All shall have liberty to renounce those things which have been established in their favor.

Omnia præsumuntur rite et solemniter esse acta. All things are presumed to have been rightly and regularly done.

Omnis exceptio est ipsa quoque regula. An exception is in itself also a rule.

Omnis ratihabitio retro trahitur et mandato æquiparatur. Every subsequent ratification has a retrospective effect, and is equivalent to a prior command.

Opinio quæ favet testamento est tenenda. That opinion is followed which favors the will.

Optima enim est legis interpretres consuetudo. Usage is the best interpreter of law.

Origo rei inspicere debet. The origin of a thing ought to be enquired into.

Ouster. A dispossession.

Overt. Open; public.

Owerty. The difference which is paid or received by one

coparcener to another for the purposes of equalizing a partition.

Oyer et terminer. To hear and determine.

P

Parole. Verbally.

Parum proficit scire quid fieri debet, si non cognoscas quomodo sit facturum. It avails little to know what ought to be done, if you do not know how it is to be done.

Pendente lite. Whilst the contest (or suit) is depending.

Per annum—Per diem. By the year; by the day.

Per autre vie. For the life of another.

Per capita. "By the heads or polls;" a division, share and share alike.

Per duellum. By single combat.

Per se. By himself, herself, or itself.

Per stirpes. By stock; by lineage.

Per totam curiam. By the whole court.

Per verba de futuro. By words of future acceptance.

Per verba præsentis. By words of the present time.

Per viam eleemosynæ. By way of charity or alms.

Pendente lite nihil innovetur. During litigation nothing should be changed.

Periculum rei venditæ, nondum traditæ, est emptoris. The purchaser runs the risk of the loss of the thing sold, though not delivered.

Plena fides. Full credit.

Pluries. "Very often." Also the name of a third writ, after two have issued against a defendant.

Plus peccat auctor quam actor. The instigator of a crime is worse than he who perpetrates it.

Pone. "Put." The name of a writ or process in replevin.

Ponderantur testes non numerantur. Witnesses are weighed, not counted.

Posse comitatus. "The power of the county." Which the sheriff is authorized to call out whenever an opposition is made to his writ or to the execution of justice.

Post diem. After the day.

Post mortem. After the death.

Post nati. After-born.

Post obit. After the death.

Post terminum. After the term.

Postea. "Afterwards." The name given to the endorsement of the verdict made on the record.

Potentia non est nisi ad bonum. Power is not conferred but for the public good.

Potest quis renunciare pro se, et suis, jus quod pro se introductum est. A man may relinquish, for himself and those claiming under him, a right which was introduced for his own benefit.

Præcipe. Command.

Præcipe in capite. A writ of right, so-called.

Præsumptio violenta, plena probatio. Violent presumption is full proof.

Prima facie. On the first view or appearance of the business.

Prochein ami. The nearest friend.

Pro rata. According to the rate, proportion, or allowance.

Pro tanto. For so much.

Prohibetur ne quis faciat in suo quod nocere possit alieno. It is prohibited to do in one's own property that which may injure another's.

Pueri sunt de sanguine parentum, sed pater et mater non sunt de sanguine puerorum. Children are of the blood of their parents, but the father and mother are not of the blood of their children.

Pur autre vie. For the life of another.

Q

Quæ in curia acta sunt rite agi præsumuntur.

Whatever is done in court is presumed to be rightly done.

Quæcunque intra rationem legis inveniuntur, intra legem ipsam esse judicantur. Whatever appears within the reason of the law is considered within the law itself.

Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud. When anything is

commanded, everything by which it can be accomplished is also commanded.

Quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest.

When the law gives anything it gives the means of obtaining it.

Quando verba et mens congruunt, non est interpretationi locus. When the words and the mind agree there is no place for interpretation.

Quantum damnificatus. Amount of damage.

Quantum valebat. As much as it was worth.

Quare clausum fregit? Wherefore (or why) did he break the close?

Quasi ex contractu. In nature of a contract.

Quasi ex delicto. As of an offence (or crime).

Qui facit per alium facit per se. He who acts by or through another, acts himself.

Qui hæret in litera, hæret in cortice. He who adheres to the letter adheres to the bark.

Qui jure suo utitur, nemini facit injuriam. He who uses his legal right harms no one.

Quid pro quo. A mutual consideration.

Quo animo. With what intent.

Quo warranto. "By what authority." The name of a writ against a person who has usurped a franchise or office.

Quoad hoc. With respect to this.

Quod ab initio non valet, in tractu temporis non convalescet. What was not good in the beginning cannot be rendered good by time.

Quod alias non fuit licitum necessitas licitum facit. Necessity makes that lawful which otherwise were unlawful.

Quod detinuit. Which he (or she) detains.

Quod initio vitiosum est non potest tractu temporis convalescere. Time cannot render valid an act void in its origin.

Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire. He who suffers damage by his own fault is not held to suffer damage.

Quod quis sciens indebitum dedit hac mente, ut postea repeteret, repetere non potest.

What one has paid knowing it not to be due, with the intention of recovering it back, he cannot recover back.

Quousque debitum satisfactum fuerit. Until the debt be satisfied.

R

Ratio legis est anima legis. The reason of the law is the soul of the law.

Rectus in curia. "Untainted in court;" with clean hands.

Reddendum. To pay; to yield; to render. The reservation of rent, etc., in a deed.

Registrum. A registry; a place for depositing wills, deeds, etc.

Remittitur. To restore (or send back).

Replegiari facias. That you cause to be replevied.

Res inter alios judicatæ nullum aliis præjudicium faciant. Matters adjudged in a cause do not prejudice those who were not parties to it.

Res integra. An entire (new or untouched) matter.

Res judicata pro veritate accipitur. A thing adjudged must be taken for truth.

Rescous. A rescue.

Residuum. "The remainder." Frequently applied to that part of the testator's estate not especially disposed of.

Respondere non debet. He ought not to answer.

Retorna brevium. The return of writs.

Retorno habendo. That a return be had.

Reversetur. Let it be reversed.

Rex non potest peccare. The king can do no wrong.

Rex nunquam moritur. The king never dies.

S

Sans issue. Without children.

Scienter. Knowingly; wilfully.

Scientia utriusque par pares contrahentes

facit. Equal knowledge on both sides makes the contracting parties equal.

Scintilla. A tittle; a spark.

Scire facias. That you make known. This is the name of a writ, for many purposes, commanding the defendant to show cause why a certain specific thing should not issue on an old judgment, etc.

Scire fieri. To be informed.

Scribere est agere. To write is to act.

Secta. A suit; litigation. Also, the pledges produced that the plaintiff should prosecute his claim.

Sed per curiam. But by the court.

Semble. It seems.

Semper qui non prohibet pro se intervenire, mandare creditur. He who does not prohibit the intervention of another in his behalf is supposed to authorize it.

Sequestrari facias. That you cause to be sequestered.

Sijudicas, cognosce. If you judge, understand.

Sine die. "Without day." As, the court adjourned "sine die"—no day being mentioned for sitting again.

Sine qua non. An indispensable condition.

Son assault. His own assault.

Sponsalia. Marriage contracts.

Sponsio judicialis. A judicial agreement.

ss. (Scilicet.) To wit; namely.

Stabit præsumptio donec probetur in contrarium. A presumption will stand good until the contrary is proved.

Stare decisis. To abide by or adhere to decided cases.

Statutum generaliter est intelligendum quando verba statuti sunt specialia, ratio autem generalis. When the words of a statute are special, but the reason of it general, it is to be understood generally.

Stirpes. The stock; lineage; race.

Stricti juris. Of strict right (or law).

Sub finem. Under a penalty.

Sub modo. Under a condition; within bounds.

Sub potestate viri. Under the control of the husband.

Subpœna. "Under a penalty." A writ so-called to procure the attendance of a witness.

Subpœna ad testificandum. A subpœna to give evidence.

Subpœna duces tecum. "Bring with you, under a penalty." The name of a writ by which a witness is commanded to produce something in his possession, to be given in evidence.

Subsidium justitiæ. An aid to justice.

Suggestio falsi. A suggestion (or incitement) to falsehood or wrong.

Sui generis. "Of his own kind;" not to be classed under any ordinary description.

Sui juris. Of his own right.

Supersedeas. "You may remove or set aside." A writ so called to stay proceedings.

Supra protest. An acceptance of a bill **after protest**.

Suppressio veri, expressio falsi. Suppression of the truth is (equivalent to) the expression of what is false.

Sur trover et conversion. Upon trover and conversion.

T

Tenendum. "To hold." That clause in a deed wherein the tenure of the land is created and limited.

Terminus. The end, limit, or boundary. Sometimes it means the stock or root to which, by reference, the future succession is to be regulated.

Terra transit cum onere. Land passes with the incumbrances.

Terre tenant. The tenant who occupies the land; he who has the actual possession.

Testari. To be witnessed.

Testatum. It is testified.

Testatum capias. That you take the person testified (or to have been proceeded against elsewhere).

Testatum fieri facias. That you cause the testified writ to be executed.

Testatum pluries. A testified process issued more than twice.

Teste. The date; the supposed issuing of process.

Testis de visu præponderat aliis. An eye-witness outweighs others.

Tort. A wrong; an injury.

Tort-feasor. A wrong-doer; a trespasser.

Traditio loqui facit chartam. Delivery makes the deed speak.

Trespass, quare clausum fregit. Trespass, wherefore he broke the close.

Trespass vi et armis, de uxore rupta et abducta. Trespass with force and arms, concerning a wife taken and carried away.

Triatio ibi semper debet fieri, ubi juratores meliorem possunt habere notitiam. Trial ought always to be had where the jury can have the best knowledge.

Tutius erratur ex parte mitiori. It is safer to err on the side of mercy.

U

Ubi jus, ibi remedium. Where there is a right there is a remedy.

Ubi jus incertum, ibi jus nullum. Where the law is uncertain there is no law.

Ubi pugnantia inter se in testamento juberentur, neutrum ratum est. When two directions conflicting with each other are given in a will, neither is held valid.

Ubi quis delinquit ibi punietur. Let a man be punished where he commits the offence.

Ubi verba conjuncta non sunt, sufficit alterutrum esse factum. Where words are used disjunctively, it is sufficient that either one of the things enumerated be performed.

Ultra mare. Beyond sea.

Usance. Usury; interest.

V

Vacatur. It is set aside; vacated.

Vani timoris justa excusatio non est. A frivolous fear is not a legal excuse.

Venditioni exponas. That you expose to sale.

Venire. To come.

Venire ad respondendum. To come to make answer.

Venire de novo. To come anew.

Venue. The place from which the jury come.

Verba intentioni, non e contra, debent inservire. Words ought to be made subservient to the intent, not contrary to it.

Vi et armis. By force and arms; by unlawful means.

Via antiqua via est tuta. The old way is the safe way.

Vicarius non habet vicarium. A deputy cannot appoint a deputy.

Vice versa. On the contrary.

Vicini vicinora præsumuntur scire. Neighbors are presumed to know things of the neighborhood.

Vinculo matrimonii. In the bond of wedlock.

Viv legibus est inimica. Force is inimical to the laws.

Vitium clerici nocere non debet. Clerical errors ought not to prejudice.

Viva voce. Verbally.

Voire dire. Witnesses are sometimes examined upon "voire dire" previously to their being examined in chief; this is done to ascertain whether they are interested in the cause at issue, or labor under any other incapacity which may render them incompetent to give evidence.

Volenti non fit injuria. He who consents cannot receive an injury.

Vox emissa volat, litera scripta manet. Words spoken vanish, words written remain.

TABLE OF BRITISH REGNAL YEARS.

SOVEREIGNS.	Commence- ment of Reign.	Length of Reign.	
William I	Oct. 24, 1066	21	Maurice.
William II	Sept. 26, 1087	13	
Henry I	Aug. 5, 1100	36	
Stephen	Dec. 26, 1135	19	
Henry II	Dec. 19, 1154	35	Glanville.
Richard I	Sept. 23, 1189	10	
John	May 27, 1199	18	
Henry III	Oct. 28, 1216	57	Bracton.
Edward I	Nov. 20, 1272	35	
Edward II	July 8, 1307	20	
Edward III	Jan. 25, 1326	51	
Richard II	June 22, 1377	23	Arundel.
Henry IV	Sept. 30, 1399	14	
Henry V	March 21, 1413	10	
Henry VI	Sept. 1, 1422	39	Fortescue.
Edward IV	March 4, 1461	23	Littleton.
Edward V	April 9, 1483		
Richard III	June 26, 1483	3	
Henry VII	Aug. 22, 1485	24	
Henry VIII	April 22, 1509	38	Wolsey.
Edward VI	Jan. 28, 1547	7	
Mary	July 6, 1553	6	
Elizabeth	Nov. 17, 1558	45	Bacon.
James I	March 24, 1603	23	Coke.
Charles I	March 27, 1625	24	
The Commonwealth	Jan. 30, 1649	11	Hale.
Charles II	May 29, 1660	37	Clarendon.
James II	Feb. 6, 1685	4	Jeffreys.
William and Mary	Feb. 13, 1689	14	
Anne	March 8, 1702	13	Holt.
George I	Aug. 1, 1714	13	Hardwicke.
George II	June 11, 1727	34	Mansfield.
George III	Oct. 25, 1760	60	Blackstone.
George IV	Jan. 29, 1820	11	Eldon.
William IV	June 26, 1830	7	Brougham.
Victoria	June 20, 1837		Denman.



CHIEF JUSTICES

OF THE SUPREME COURT OF THE UNITED STATES,
FROM MARCH 4TH, 1789.

John Jay, of New York, appointed by the President, with the advice and consent of the Senate, September 26th, 1789. Nominated 16th, and confirmed 19th, of April, 1794, Envoy Extraordinary to England. Resigned as Chief Justice.

John Rutledge, of South Carolina, appointed July 1st, 1795, in recess of Senate, in place of Jay, resigned, and presided on the bench at the August term, 1795. Nominated 10th, and rejected by the Senate 15th, December, 1795

William Cushing, of Massachusetts. Nomination confirmed and appointed, etc., January 27th, 1796, in place of Jay. Declined the appointment. He was then an Associate Justice.

Oliver Ellsworth, of Connecticut. Nomination confirmed and appointed, etc., March 4th, 1796, in place of Cushing, declined. Appointed Envoy Extraordinary and Minister Plenipotentiary to France February 27th, 1799. Presided on the bench at the August term, 1799. Proceeded on his mission to France November 3d, 1799, resigning as Chief Justice.

John Jay, Governor of New York. Nomination confirmed and appointed, etc., December 19th, 1800, in place of Ellsworth, resigned. Declined the appointment.

John Marshall, Secretary of State. Nomination confirmed 27th, and appointed, etc., January 31st, 1801, in place of Jay, declined. Died in 1835.

Roger B. Taney, of Maryland. Nomination confirmed and appointed, etc., March 15th, 1836, in place of Marshall, deceased. Died in 1864.

Salmon P. Chase, of Ohio. Nomination confirmed, appointed, etc., December 6th, 1864. Died in December, 1873.

Morrison R. Waite, of Ohio. Nominated January 19th, 1874, and nomination confirmed, appointed, etc., in February, 1874.







